

ISLAMIC LAW AND SOCIETY IN THE SUDAN

Carolyn Fluehr-Lobban

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CAROLYN FLUEHR-LOBBAN

*Department of Anthropology
Rhode Island College*



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Dedication

To

‘Moalana’, Sheikh Mohammed al-Gizouli,
Grand Qadi of the Sudan, 1973–79

and

Sayeda Nagua Kemal Farid,
First Class Shari’a Judge, 1970 to present

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In the Sudan the list of those who aided this research is almost too extensive to enumerate, however certain individuals and institutions must be singled out for mention. First among these are the two individuals to whom the book is dedicated, Sheikh Mohammed al-Gizouli, Grand Qadi of the Sudan from 1973–79, and Justice Najua Kemal Farid, First Class Judge assigned to the Shari'a High Court. It is not an overstatement to say that without their generous sharing of time and knowledge this book would not have been written. Justice Najua is a friend from the earliest days of research in 1970 and her interest in and support of this work from its very conception has been unequivocal and wholehearted. She often took time from her busy schedule to accompany me to court especially for those all-important introductory visits. She assisted with the collection of statistics, with translation of legal materials and with patient explanation of points of law which escaped my immediate grasp. She took the time to question me to be sure of my comprehension, and in the process of our work together our friendship deepened to new levels of human understanding. Typically in the Sudan, this friendship broadened to include both of our families and I dedicate this book not only to Najua but to the memory of those happy days together.

'Moalana' Sheikh al-Gizouli shared willingly with me the wisdom

of his education and experience with the Shari'a as theory and practice in the Sudan. His reputation as one of the most learned men to hold the office of Grand Qadi is justified and can be appreciated in the reading of the Judicial Circulars (Nos. 59–62; Fluehr-Lobban and Hillawi, 1982) which were issued during his term. His scholarly approach to the subject of *al-fiqh* as well as his pragmatic approach to real dilemmas in the law are a mark of his judicial career. His view on the land and social problems, with a healthy mixture of real concern for the welfare of people combined with a sense of humor, brought to life the very human side of the law. Sheikh al-Gizouli, although labeled a religious conservative by some, nevertheless was in the main responsible for the appointment of women judges to the Shari'a court system. For his patience and kindness in guiding me through the complex study of the Shari'a, I shall always be indebted to Sheikh al-Gizouli. For these reasons, and more than I can put into words, I acknowledge my debt to Justice Najua Kemal Farid and Sheikh Mohammed al-Gizouli by dedicating this work to them.

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I have left to the last loving acknowledgement of the support of my own family, that of Richard Andrew Lobban and Josina and Nichola Fluehr-Lobban, which in many ways has been the most critical. Life in Khartoum during 1979–80 was not easy, and it remains so today. Despite perennial shortages or the non-availability of basic commodities, added to this bouts of malaria for us all and pneumonia for Josina, the mood of the family remained positive and supportive. My husband, engaged in his own research in Sudanese urbanization, shared the academic as well as the social side of my studies, while Josina provided us with a fascinating glimpse of Sudanese culture through the eyes of a two and a half to three year old.¹ Together we shared the challenge and the deeply rewarding experience of living and working in the Sudan.

My mother, Anne Fluehr, was a tremendous source of support to me and my younger daughter, Nichola, during the major writing of the manuscript while in Philadelphia, as were my mother- and father-in-law, Dorothy and Richard Lobban.

NOTE

1. Published and duly recognized as 'Josina's Observations of Sudanese Culture', *Human Organization*, Vol. 20: 1980.

PREFACE

'... so many great English writers have concentrated on the Bedouin side of the story; very few have any clear picture at all of how twentieth century educated Islam lives, feels and thinks.'

John Fowles, Introduction to *Miramar*,
a novel by Naguib Mahfouz

The ideology and culture of Islamic regions has aroused renewed interest in the West since the oil crisis of the 1970s, the political events in Iran and the rise of 'fundamentalist' Islam. Oil wealth in some countries and extreme underdevelopment and dependency in other countries have set the stage where Western influence has not been so great in the Middle East and Africa since the time of European colonialism. Yet in the face of tremendous cultural pressures to 'secularize' and 'westernize', Islamic institutions have stood fast and have resisted their transformation from the West and in certain ways have enjoyed a revival and a constructive re-examination.

Islamic law, the Shari'a, is one such basic institution which has been subjected to a great deal of this pressure because its essence is religious belief applied to the practical problems and affairs of daily living. Relegated as it has been in most modern Muslim areas to a personal status law alone, the arena of family law has been a focus of the current debate to liberalize the law or to reassert traditional interpretations regarding marriage, divorce, and inheritance, especially. Often liberal moves have been taken to be of Western inspiration, but this study shows that, for the Sudan, legal innovation and change in the twentieth century is for the most part Islamic in both inspiration and execution. To be sure many of these developments took place in the context of colonialism and were reactive to it, but the question is not how the Shari'a was changed by Western influence, but how the Shari'a survived the onslaught. One reason for the relative independence of the Shari'a in the Sudan is the autonomy which was granted to 'Mohammedan' institutions by the British after the reconquest, in the face of having crushed an Islamic rebellion, that of the Mahdists, which itself defeated British forces in 1884. Numerous concessions to Islamic elements were

granted in the establishment of the Anglo-Egyptian Sudan in 1900; of importance to this study was the separate jurisdiction and functioning of the Shari'a courts. This allowed a degree of independence from English administration which other segments of the law did not share. After independence in 1956, the basic structure of the law remained intact keeping the Civil and Shari'a divisions separate, and further development of Islamic law continued in a manner which was consistent with rather than a break with the past.

The present study comes at an opportune time because it was conducted at the time when the system just described was coming to an end, in 1979. In that year the courts began a process of amalgamation of the Civil and Shari'a law which was to be completed in three years' time. Thus this study is not only the first exploration in English of Islamic law and society in the Sudan, but it is set in a time, the last time, that the Shari'a law and courts functioned as a separate and independent system. Although the former system is still very much in evidence, the future course for the development of a combined law and courts is set.

Very few studies exist which attempt to be comprehensive regarding the subject of Islamic law in practice in particular countries, among these Djamour's study of the Muslim matrimonial courts of Singapore (1962) and Layish's study of the Shari'a (1975) as applied in the occupied Arab territories of the state of Israel. No such study of Islamic law in operation in a Muslim African state or region exists, especially important as such studies would highlight the role of custom in the local development of the Shari'a. This study is built upon the scholarly contributions of J.N.D. Anderson, who is without peer as a compiler of recent change in Islamic law in Africa, the Middle East and Asia, as well as the work of Trimingham and Coulson. Yet in many ways it represents a break with past scholarship in that it deals essentially with the law in practice, rather than primarily in theory, and in interpretation, and it attempts to be Sudan-centered, telling the story of the law in its own terms and not in terms of Western stereotypes.

A great deal of the misapprehension in the West surrounding Arab society has focused on the law as archaic, rigid and harsh in its application. The Shari'a is neither unbending nor doctrinaire, as exemplified in its ability to amend itself, in the case of divorce reform. But it does reflect and uphold the cultural system and set of beliefs out of which it emerged, that of Islam. The fundamental difference between Islamic and Western conceptions of law is one of culture. For example Islamic law favors the values of honor and sexual propriety and so it defends the legitimate sexual access to women through polygamy and regards as dishonorable any result of illicit sexual contact. Divorce is reprehensible and is not viewed generally as representing freedom for women,

which might be said to be the opposite of its interpretation socially in the West. Marriage is still very much a family affair and is not an institution, socially or legally, to be left to the two individuals concerned alone. The law of inheritance, rather than emphasizing the individual benefit of nuclear family members, represents a balance between the interests of the agnatic kin and the nuclear family. The law in this area as well has undergone an evolution away from the unrestricted rights of the male agnates to a greater emphasis on the nuclear family, an historical trend traceable to the origins of Islam itself when rights of inheritance were bestowed on certain categories of female kin not among the agnatic relations.

As a system of law the Shari'a is rather unusual in so far as it is at once both essentially sacred in its theological foundations and profoundly secular in its practical application. In the area of personal law, theology and the state are not separate, but are one, with respect to the governance of the affairs of Muslim citizens. To be sure the interests of the secular state often override matters of purely spiritual character, however the power of the religious established hierarchy cannot be underestimated, and the dual nature of the law has acted as both a bridge between religion and the state and as a source of tension. It is very often an uneasy peace or a delicate balance of forces that characterizes relations between the secular state and the traditional religious leaders. In the Sudan where the state, since independence, has been ruled militarily for the most part, this tension has erupted into major confrontations on a number of occasions resulting in a realignment of forces favoring for a time religious or secularizing moves. The Shari'a at this time is a focus of this tension as various political elements are promoting or opposing the move toward an Islamic-based constitution in the Sudan. It is thus an inescapable fact that Islamic institutions are bound to nationalist political sentiments. As such the endurance and even revival of the basic Islamic way of life, embodied in the Shari'a, is a major feature of contemporary Muslim life and politics and is likely to remain so for some time. It is equally apparent that change has and will continue to take place within an Islamic cultural framework, one part of which is the changing, adapting and developing Shari'a.

METHODOLOGY

I have conducted anthropological research into the dynamics of law and society in the Sudan since 1970. Originally I researched and analyzed the socio-legal aspects of homicide in the country as a whole (1972; 1976). Later I investigated the status of women by looking specifically at the effects of the Sudanese women's movement on the reform of both Civil

and Islamic law (1974; 1977). It was the contradiction between myth and fact, between stereotype and reality of Sudanese Muslim women that attracted me to the latter study, and it was basically this same motivation that inspired my interest to make a study of Shari'a law in the Sudan. As the strength and independence of Sudanese women I came to know violated the stereotype of the docile Arab woman, I wanted to discover if Islamic law was as socially retrograde as its stereotype in the West. In the course of my research I uncovered not only enlightenment and progressive thinking, but also a very human application of the law in Sudanese jurisprudence and in the courtrooms which I visited.

The study was conducted during 1979–80 in Khartoum, comprising the three towns of Khartoum, Omdurman and Khartoum North. Its geographical base is urban, primarily, as are the Shari'a courts primarily an urban phenomenon. Rural case material is included here as well to show the role of custom and its interplay with formalized Shari'a law. During the course of the research we lived with Sudanese family friends in Omdurman and later as a nuclear family in Khartoum.

The research comprised several phases and basic elements including bibliographic research, study of the Shari'a, translation of existing materials and direct courtroom observations. With respect to general sources on Islamic law the libraries of the Law and Social Sciences Faculties of the University of Khartoum were very helpful as was the special Sudan Collection of the general library of the University. As very little material on the application of the Shari'a in the Sudan exists, in Arabic or English, a great deal of my data had to be self-generated. As such, primary case material was collected through the kind assistance of the staff in the Sudan Judiciary along with basic statistics for the operation of the Shari'a courts and the record keeping of the *maa'zuns* who register marriages and divorces. These were collected for the Sudan as a whole as well as for the metropolitan Khartoum area during the period of the 1970s.

As the importance of the Judicial Circulars, which have been issued from the office of the Grand Qadi on specific points of law since the early part of this century, became apparent, I undertook the project of translating them in full with a Sudanese colleague. Certain of the circulars had been summarized by J. N. D. Anderson in his *Islamic Law in Africa* (1955) and elsewhere, but the circulars since the 1960s had not been reported upon nor received comment. Moreover a complete translation was necessary for my work in the history of the development of the Shari'a law in the Sudan in the twentieth century.* The circulars, constituting essential features of the applied law in the Sudan, form an

* *Judicial Circulars of the Shari'a Courts in the Sudan, 1902–79* (*Manshurat al-Mhakim al-Shari'a fi Sudan*), *Journal of African Law*, 27: 2, 1983.

integral part of this study in so far as they have given major direction to currents in the law during the course of this century.

At the Sudan Judiciary I was warmly received by my friend and colleague, Sayeda Najua Kemal Farid, a First Class Shari'a judge attached to the High Court, who introduced me to Sheikh Mohammed al-Gizouli, then Grand Qadi of the Sudan. As Sheikh Mohammed was about to retire at that time in 1979 he had some free time and agreed to take me on as a student of the Shari'a both as philosophy and jurisprudence and as a matter of practical application in the Sudan. 'Moalana' (the honorary term for judges) has had a lengthy experience in the Islamic courts, serving over the past few decades in many provincial towns as well as Khartoum. For discussions of matters of marriage, divorce, inheritance, wills and the like Justice Najua often joined us. She had been Sheikh al-Gizouli's student at the University of Khartoum in the late 1960s and he was among those who had recommended her appointment as an Islamic judge in 1970 making her not only one of the youngest judges in the country, but probably the first woman to be appointed as a Shari'a judge in the modern African Muslim world.

Several times a week for four months we met in the Grand Qadi's chambers in the Judiciary during which time I also observed a number of urgent cases brought before the High Court as well as a session of the High Court and the issuing of one of the Judicial Circulars. On other days I began my visits to the various Islamic courts in the three towns, including observations in Second Class, First Class and Province courts, so combined with the High Court observations just mentioned, I have sat in Shari'a courts at each of the various levels of the judicial hierarchy. As I gained in experience, I found the Second Class courts and Province courts most active and interesting as the former dealt with the first hearing of the case while the latter dealt with more serious matters or cases on appeal. The tolerance of my presence in each of these courts by the judges even to the point of stopping sessions and explaining various points of the law, is but one mark of the overall openness and hospitality extended to me during the entire course of the research. During the period of my courtroom experience I collected information on 60 cases through direct observation while several other cases were taken from the file of recent cases in the High Court. For the cases which I was able to follow from one session to another, I had the opportunity to become acquainted with the litigants and to learn other facts not necessarily part of the legal case, but which were nevertheless useful in a sociological interpretation of the case. In every instance in this study, the identity of litigants associated with Shari'a cases is protected for there is a high degree of social stigma attached to the use of the courts.

A number of lawyers who specialize in the Shari'a were also of great assistance in introducing me to interesting cases, interviewing litigants and observing simple legal procedures in their offices. I visited the special section of the court devoted to the handling and expediting of simple inheritance cases and observed the initiation of suits as well as the registration of marriages and divorces with the *maa'zun(s)* attached to the Shari'a court. In these ways I attempted to gain an accurate picture of the daily functioning of the courts.

Other parts of my commentary herein, especially as related to matters of Sudanese society, have been gleaned from more than a decade during which, at various times, I have lived and conducted research in the Sudan. Living and visiting with Sudanese families and speaking the colloquial language have aided enormously in an understanding of Sudanese life. Experiencing first-hand the ease and pleasure of life in Khartoum in 1970–72 as contrasted with the struggle for basic services and commodities that life had become in 1979–80 is a fundamental lesson in economic and social change that provides the larger context for this study. Khartoum has more than doubled its population in the decade from 1970–80 and the economic crisis grew and worsened during that time resulting in great pressure exerted on traditional family life. Cases unheard of in the past, such as a court order for a son to support his mother, were now making their appearance. Judicial divorce by women increased as did the number of young women who married without the consent of their fathers. Society had become more clearly divided along class lines and strong political movements moved in opposite directions with respect to the law, towards greater reform of the Shari'a and towards its fundamental restoration. Still the Sudanese remain in their character proud and uncorrupted, dignified and generous, sensitive and caring about others and as such it has been a deeply rewarding experience to have lived and worked among them, even for a time.

CHAPTER ONE

INTRODUCTION TO ISLAMIC LAW

Islamic law is among the world's oldest and most widely practiced systems of law. Its influence extends from the Middle East and Southwest Asia to North, West and East Africa and beyond these to Central Asia, Indonesia and Malaysia. The extent of that influence depends on the particular history of each country and current governmental form, whether tending toward the secular or religious. Despite its impact on nearly a quarter of the world's population, Islam, the religion, its law and society are poorly understood and are subjected to incorrect and misleading stereotypes in the West. This is the result of many factors, not the least of which is the historical confrontation between Islam and Christianity and the colonization of large parts of the Arab Islamic world in modern times by Western imperial powers. With a long period of colonialism extending across the nineteenth and twentieth centuries, the scholarly study of Islam by Western Orientalists lacked a certain objectivity and has been criticized for its ethnocentrism and its anti-Islamic biases (Tibawi, 1963; Said, 1978).

During the past several decades, in the ensuing years after independence was achieved throughout the region, a new generation of indigenous scholars has emerged which has had the effect of balancing the shortcomings of the Western scholarship. After these have come a newer generation of Western scholars (a trend which is still emergent) who are less judgmental of Islamic society and who are adopting the role of cultural translator in an effort to correct the ethnocentric biases of the past. The treatment of Islam, its history and culture, is less subjective and more sympathetic to the internal developments within particular countries rather than viewing the West as primary inspiration for cultural innovation. It is among this group of scholars that I count myself.

ORIGINS OF THE SHARI'A AND THE SCHOOLS OF LAW

The genesis of Islamic law lies with the origin of the religion of Islam itself, for in Islam religion and law are inseparable. The religion of Islam was revealed by God, Allah, to the Prophet Mohammed at Mecca and Medina from 607–632 A.D./13 B.H. – 12 A.H. and is contained in the Holy Book of al-Islam, the Qur'an. Beside the revealed texts (each called *Sura*), the quotations attributed to the Prophet Mohammed and the sacred practice of the Prophet, *hadith* and *sunna*, form the basis of the religion of Islam. *Hadith* is also the form in which the holy sayings and custom of the Prophet are transmitted; it is both the documentation of *sunna* (practice) and its means of transmission from one generation to the next of Muslims. For Islamic scholars the study of the Qur'an, *hadith* and *sunna* is the key to the understanding of the way to lead a perfect life under Islam. Islam means 'submission' in Arabic and the Muslim is the one who 'submits' to the will of Allah and to correct practice as interpreted from the mentioned sources. The law, *al-Shari'a* (literally 'the way' or in its original usage 'the path to the watering place'), is derived from the eternal sources of Qur'an and *hadith*, a part of which is the practice or *sunna* of the Prophet and his followers, and therefore is in its essence a religious law. The two great branches of Islam are the Sunni Muslims, who are followers of the traditions associated with the Prophet, and Shi'a Muslims, who accept only the traditions of the family of the Prophet Mohammed.

While the Shari'a is essentially religious, it is also profoundly secular in that it deals with the orderly and proper conduct of Islamic society, and from its beginnings it has dealt with practical problems. Many of the *hadith* of the Prophet, upon which aspects of the law have been constructed, were statements of correct practice in response to real difficulties which emerged in the society of Arabia during the early days of Islam. In its fullest expression the Shari'a is all encompassing, as it is capable of regulating affairs from the level of families to that of the state and its relations with Muslim and non-Muslim outsiders. 'The way', *al-Shari'a*, is meant to embody correct Muslim practice in all matters, be they spiritual or the practical concerns of daily life.

During the early period of Islam, the word *al-fiqh* (understanding) was used for the study of theology as well as of the law. In modern usage *al-fiqh* has become almost exclusively associated with a deeper study of the law, beyond its procedures and rules, to its sources, and the term corresponds approximately to the Western conception of 'jurisprudence'. Much later the term Shari'a came to be the accepted referent for the law of Islam and it is the term most widely used in the Muslim world today for both the study and practice of Islamic law.

In the Sudan the term for the study of the personal law (*al-ahwal ashakisia*) is also an accepted popular term for the Shari'a as a whole.

The history of Islamic law has been comprehensively treated by the Orientalists Joseph Schacht (1950; 1964) and N. J. Coulson (1964), writing in English, by Goldhizer (1910), writing in German, by Duclos (1919), writing in French, and by a host of Arabic and Islamic scholars in modern times including Ameer Ali (1894), Sh. Abdul Kadir Mekkawi (1899), Asaf Fyze (1964), Mohammed Hidayatallah (1968) to mention only a few of the more prominent scholars whose works have been written in or translated into English. In recent years John L. Esposito has produced a useful survey of contemporary Muslim family law (1982). The list of Arabic writers on *al-fiqh* is too lengthy to compile, for the science of Islamic jurisprudence is one which extends over the past 14 centuries and encompasses many nationalities and separate traditions. Especially for the Sudan, writers who have been concerned with historical aspects of the introduction and development of Shari'a are Anderson (1955; 1960), Farran (1963), Trimingham (1949; 1965) and Spaulding (1977). During 1979–80 I have translated, with a Sudanese colleague, the Judicial Circulars of the Shari'a courts in the Sudan in the twentieth century, which constitute essential features of the applied law in the country. Together with its historical introduction and treatment of various specialized topics in the law, the work constitutes a survey of the development of the Shari'a in the Sudan during the colonial and post-independence period.

Of the two great Branches of Islam, the Shi'a and Sunni, the vast majority of Muslims in Africa, including the Sudan, adhere to the latter branch. In Sunni Islam four major schools of law (*madhab*, pl. *madhahib*) have developed, mainly during the early period of interpretation of theology and law in the first century after the introduction of Islam. The subject of the development of the schools of law has been treated extensively by J. Schacht in his *Origins of Islamic Jurisprudence* (1950), Margoliouth (1913) in *The Early Development of Mohammedism* and Coulson in *A History of Islamic Law* (1964). For a detailed presentation of this special topic I would refer the reader to these sources.

As Islam itself was built upon the existing society in Arabia, so Islamic law developed in the context of that society, reformed and reconstructed by the religion of Islam whereby new practice gradually became solidified into law and legal doctrine for the areas that had adopted Islam. Thus as Islam spread from the Arabian peninsula to Iraq and Iran, Syria and Palestine, Egypt and North Africa in the first and most expansive century of Islam the religion was imposed on many different nations, with different languages and customs. With the Arab conquests came

not only Islam but the culture and values of the Arabian desert which form the initial period (from the 7th to the 10th century A.D.; 1st–3rd century A.H.) of Arabization and Islamization in the regions later known as the Middle East and North Africa. The Maghreb (the direction of the west generally in Arabic) has been the referent for the regions of Morocco, Algeria and Tunisia since the early days of Islam.

During the crucial first centuries of Islam four schools of Islamic jurisprudence crystallized, the Maliki, Hanafi, Shafi'i and Hanbali schools respectively. Although many schools (*madhahib*) have emerged during the long history of Islam, only these four are recognized today in Sunni Islam and every Muslim adheres to one of these for the correct practice of *ibadat*, governing man's conduct toward God, or *mu'amalat*, laws governing human relations. By far the greater number of injunctions and commands for the community of believers is concerned with *ibadat* which is much more fixed and immutable than relations among people. The schools have developed doctrinal and practical differences among them with regard to both of these. The schools developed from the *ra'y* (opinion) of individual scholars and with the gradual growth of agreement among scholars in a particular locale, consensus led to doctrine and many doctrines to a school. *Sunna* (literally 'beaten path') was originally customary practice, but in the developing jurisprudence of the first and second centuries of Islam, *sunna* became ideal doctrine established in the school and expounded by its followers (Coulson, 1964: 39).

In greatly simplified form, the following is a brief description of each school or *madhab*. The founder of the Hanafi *madhab*, Abu Hanifa (d. A.H. 150/A.D. 767), was an Iraqi legist in Baghdad who closely counseled the Abbasid jurists and thus exerted a profound influence on them. His pupils, Abu Yusuf and al-Shaybani, are nearly as well known in the Arabic literature for their learned opinions. The Hanafi school has been said to be concerned with practical as well as theoretical questions, and as such has gained the reputation of allowing more liberal interpretations of law. This is especially thought to be the case because of the school's use of and recognition of the *ijma'*, the consensus of the community. While it originated in Iraq, in modern times the Hanafi school became the official school of the Ottoman empire and as such spread to the Turkish occupied lands, including Sudan and Egypt, and regions of North Africa. Currently the *madhab* is found chiefly in Turkey (where traditional practice still obtains), Syria, Central Asia, Afghanistan, India and Pakistan. Because of its subsequent importance to areas of the British Empire, a translation of aspects of the personal law according to the Hanafi *madhab* was issued for use by colonial administrators concerned with the applied Shari'a (Mohammed Kadri Pasha, translated by Sterry and Abcarious, 1914).

The Maliki school of law became recognized through the teachings of Malik Ibn Anas (d. A.H. 179/A.D. 795) of Medina who was primarily a collector of *hadith* and so this *madhab* is especially characterized by its traditionalism and adherence to custom, which is acknowledged as Medinan practice at the time of the Prophet. The *Muwatta*, an early law book, is simply a great collection of *hadith* organized by Malik under certain topics such as marriage contracts, and Malik is credited as the transmitter of a great number of *hadith*. Malik is also credited with developing the legal principles of *al-masalih al-mursalah* (unrestricted public interest) and *istislah* (seeking the better solution). Both of these, in a sense, grew out of his reliance on customary practice as a legitimate source of law, reasoning that this was the life that the Prophet led (Mohammed Muslehuddin, 1973: 116). The Maliki school spread not so much by conquest as by the gradual and peaceful spread of Islam, especially in Africa, through trading networks and some mission activity. The Maliki school has been referred to as the African expression of Islam and indeed it exerts a dominant influence in North and West Africa, where it spread initially by conquest and later by trading contacts, in the Sudan and Upper Egypt. The majority of African Muslims adhere to the Maliki *madhab* which represents the legitimate source of Islamic custom and practice. In the Sudan there exists a certain disjuncture between the Maliki customs of the Muslim peoples and Hanafi law which was imposed first by the Turkish occupiers and carried on by the British colonizers. This creates in the Sudan a unique blend of Hanafi and Maliki law.

The Shafi'i school traces its origins to Abu Abdallah Mohammed ibn Idris al-Shafi'i (d. A.H. 204/A.D. 819, 820),¹ a Meccan from the Quraysh who taught in Fustat, Egypt, which grew into modern Cairo (ibid, p. 94). His major treatise on jurisprudence, *Risala*, is said to strike a balance between the unrestricted use of analogical reasoning in the public interest (*istihsan*) and the absolute character of the Divine Law. The school produced many distinguished jurists, among them the Syrian, al-Nawawi (d. A.H. 676), whose major work is *Minhaj al-Talibin* (Williams, 1963: 98). The Shafi'i *madhab* is the legal school in practice in Indonesia, Malaysia, Lower Egypt, parts of the Arabian peninsula, Central Asia and East Africa.

Of the four schools of Islamic jurisprudence, while there are no fundamental differences of view regarding theology and law, the Hanbali school is regarded as the most conservative relying on a literal interpretation of the Qur'an and *sunna* as the only sources of the law. Founded by Ahmed ibn Hanbal (d. A.H. 241/A.D. 855) of Baghdad it represented a sort of revivalism of fundamental Islam in that it revealed a developing rationalism in Islamic theology and

accepted no statement or premise not explicitly found in the Qur'an and *hadith*. Today the school is found in the Arabian Peninsula where it is the official school of the kingdom of Saudi Arabia.

After the developments which shaped the Hanbali school in the twelfth and thirteenth centuries A.D., the *bab al-ijtihad*, the 'door of interpretation', is said to have closed and further developments along the lines of resolving questions of substantive law and theology ceased. The 'door' remained closed until it was 'opened' in the nineteenth and twentieth centuries in the context of the great social upheavals which attended colonialism and the birth of nation-states in the Islamic regions.

Any characterization of a school of legal interpretation as conservative or liberal can lead to facile and misleading conclusions as each *madhab* is applied in particular countries with individual histories of development; thus the terms 'liberal' and 'conservative' have relative meanings. For example, with reference to the question of *al-hadana*, the care and custody of children, all schools recognize the first right of custody as residing with the mother or her close female kin. However, the more 'liberal' Hanafi school provides that boys at age seven and girls at age nine shall be remanded to the custody of their father or his agnatic kin, while the more 'traditional' Maliki school allows a mother, where good cause is shown, to retain custody of her son until the age of puberty and her daughter until the consummation of her marriage. Similarly the more 'conservative' Hanbali school permits the writing into the marriage contract of a clause of monogamy. The more important point is that there do not exist fundamental differences of opinion in matters of theology or law and the schools do not in any way constitute sects or factions of Islam.

In the Sudan the Shafi'i and Hanbali schools have exerted little or no effect on the practice of religion and law, while the Maliki law and Hanafi schools are intimately connected with its history. Maliki law is traditional and was introduced as legal and religious custom with the introduction of Islam itself in the sixteenth century A.D. Hanafi law was brought to the Sudan with the Ottoman Turkish occupation in the nineteenth century and was carried forward as the 'legitimate' school of interpretation by the British in the Anglo-Egyptian Condominium government. Left to itself the Sudan would be Maliki in both official law and custom. For the most part Sudanese Muslims follow an Imam from whom they learn Maliki practice, and the Imams are not necessarily knowledgeable of state law.

DEGREES OF OBEDIENCE TO THE LAW

In the Shari'a, generally, there exists the distinction between what is lawful (*halal*) and what is unlawful or forbidden (*haram*). The universe of what is lawful and what is unlawful practice is not written or interpreted in black and white, but in degrees of compulsory behavior. A continuum of acceptable to unacceptable practice by Muslims is thus established.

The following are the degrees of obedience to the law:

- fard* that which is commanded by God in the Qur'an, by the Prophet in the *hadith* or by consensus (*ijma'*) of the community of believers.
- wajib* very close to *fard* but a little less compulsory; an obligatory action.
- mandub* recommended action; preferred practice, but omission not punished.
- jaiz* permissible action to which the religion is indifferent.
- makruh* reprobated as unworthy action; omission preferred but commission not punished.
- haram* that which is forbidden.

(derived from Hidayatullah, 1968: xx.)

Things which are *fard* or commanded include, for example, prayer, fasting during Ramadan, the payment of *zakat* (religious taxation). Performance of the *hajj* is *wajib* or slightly less compulsory for it is commanded of every adult Muslim who is able to make his/her way to Mecca for the religious pilgrimage. The great distances and financial cost involved in making the *hajj* simply may be too great to fulfill this religious command. Acts which are commanded or obligatory by custom or consensus are more subject to local interpretation. An incident which I witnessed while in the company of one of the Shari'a judges illustrates the point. Two men had been well-acquainted, but a deep resentment had developed in one who had not been promoted in a government bureaucracy. They met by chance in the office of the judge who was acquainted with them both. The one held out his hand to shake the hand and greet the other (the disappointed government employee), who refused. The greeter, deeply insulted, began to chastise him and ask the judge's opinion about appropriate practice. The judge replied that greeting between people known to each other is *fard*, or as I interpret what was said, compulsory behavior mandated by strong traditions in the Sudan.

Recommended practice, things *mandub*, together with action that is commanded or obliged, constitute *sunna* or correct behavior. Divorce,

for example, may be carried out in a recommended form during the woman's period of purity, clearly enunciated and intended and of the single, revocable kind. Other, less than ideal, forms of divorce are nevertheless lawful in the eyes of God and the Shari'a. Female circumcision, a controversial feature of Sudanese custom, has been declared by the 'ulama to be only *mandub* and therefore recommended but not required.

Things which are *jaiz*, or wholly permissible, are, for example, a great variety of differences allowed in Muslim dress. The modesty of Muslim dress for both men and women is commanded in the Qur'an, but much diversity exists in male headgear from the *'imma* and *tagia* of the Sudan to the *kafiah* of the Levant. Food tastes and local differences in cooking style, except for the eating of pork, are entirely *jaiz*.

Makruh action is reprehensible although not punished. Divorcing a woman while she is pregnant or not in a state of purity (i.e., while menstruating) is unworthy of a Muslim husband, but not unlawful. Having sexual intercourse with a wife who is menstruating or has been divorced by him, is *makruh*, as is divorcing a wife by using the triple pronouncement, '*talaq talata*', in Hanafi law. Some scholars have noted that the most sinful form of divorce has become the most common, and countries like the Sudan have responded by limiting the power of the husband to effect a divorce in this way.

The status of actions which are *haram* in the law and in *sunna* (practice) is very clear and unequivocal. Forbidden acts include murder (except under certain conditions), theft, adultery, the eating of pork (called 'forbidden meat', *laham haram*), cursing the religion of Islam, marriage to more than four wives, marriage to any relative in the prohibited degrees (i.e., nuclear family or direct lineals), to name some of the more prominent examples. Acts which are *haram* are obviously punishable by God and by the law in its traditional form, but with the secularization of Shari'a that has occurred in most Muslim countries many of these acts are punishable by civil law. The offenses of murder, theft and adultery, for example, are punishable under the tenets of the Sudan Penal Code, itself based on the British-inspired Indian Penal Code and a model for the Nigerian Penal Code.

The word *hareem* which designates the female section of a house is derived from *haram* as it prevents the unlawful access of strangers to the women of the household. The word *haram* is also used in the colloquial language of the Sudan with respect to any act which is so shameful in human society as to be forbidden. To see people living in extreme poverty without assistance from the government or from those who might help ease this condition may be expressed colloquially as — '*ya haram*'. In the days of the popular Khartoum lottery *Tutu-kora* (since abolished in the spirit of Islamic reform), I asked a frequent better

if it was not *haram* to gamble with one's fortune – he replied, 'Is it not *haram* that I am so poor I need to search for money in this way?' Thus the concept of *haram* is more visible and more utilized in the social sense than the preceding degrees of obedience. As a means of social control the admonition '*ayb*' (shameful behavior) is more common as a reproach than the more philosophical and religious notion of *haram*.

The Arabic word for thief (*harami*) is an obvious derivative from the concept of that which is forbidden or *haram* and underscores the social as well as legal condemnation of the act.

SOURCES OF THE LAW²

The study of the sources of Islamic law constitutes a vast literature and a science unto itself, '*alm usul al-fiqh*'. It is concerned with the explication and interpretation of the sources of the Qur'an, the *hadith* and *sunna* as they have developed over the centuries since the coming of Islam. Certain doctrines or modes of interpretation have evolved in the course of the development of this science with which I will deal briefly as they relate to the history of the law in the Sudan.

The Qur'an and *hadith* are the eternal, indisputable, fundamental sources of the law. All of the *hadith* were not fully compiled until after the death of Abu Hanifa, so he could not incorporate them all into his jurisprudential thinking, whereas Malik Ibn Anas had the chance to collect and discuss *hadith* personally with the disciples of Mohammed. The application of doctrine in actual societies, increasingly diverse as Islam spread in the first great century of conquest, necessitated the growth of certain modes of judicial reasoning in cases which might not find their exact parallels for guidance in the Qur'an and *hadith*.

The sources of Shari'a, which as principles have developed within the four schools of law to apply where there is no precise provision in the Qur'an and *hadith*, are the following:

- qiyas* analogical reasoning or deduction developed by Hanafi jurists.
- istihsan* literally 'to consider a thing good' or juristic preference; the solution is admired and considered just. *Istihsan* is a derivative of *qiyas* and is justified in the *sunna* that 'what is considered good by the Muslims is considered good by God'. It also was developed by the Hanafi jurists and the principle, much quoted by the liberal reformers, is in part responsible for the reputation of the Hanafi school as being more progressive, or potentially so.
- istislah* the principle which considers the interest of the public or the good of the community; it developed from Malik's concern

- with *al-maslaha*, decisions or doctrine built in the interest of people and in consonance with the Shari'a.
- 'urf* custom, the admissibility of local traditions as long as they do not conflict with the Shari'a law.
- istishab* derived from *saheb*, friend or friendly, and applies to something which is legally permissible, or more precisely, legal presumption, for example the presumption of innocence until proven otherwise.
- siyasi Shari'a* directives issued by an Islamic ruler (*hakim*) or sovereign in light of the Shari'a where specific provision is not made in the Qur'an and *sunna*.
- ijma'* consensus of the community of scholars or those knowledgeable in *al-fiqh*.

Far from being stagnant, mainly historical principles which developed in ancient times and have since lost their utility, these principles are very much in the forefront of the discussion today regarding reform or restoration of Islamic law in the various Muslim countries. When the 'door of interpretation' is said to have reopened during the nineteenth and twentieth centuries especially, the vitality of these principles was, in a sense, rediscovered. Discussions of reform in the personal law actively engaged the principles of *istihsan* and *istislah*, while rulers, explicitly or implicitly, invoked the principle of *siyasi Shari'a* to amend or add to existing law. As such the use and alleged abuse of these legal concepts has been at times highly controversial, and the controversy is, if anything, increasing. In the context of this current dialogue jurists and legislators have been characterized as using some of the early modes of judicial behavior. For example (1) *taqlid*, holding to the tenets of one school without exception; (2) *takhir*, selection or choice of legal opinion from one school or another and more flexible than *taqlid*; (3) *talfiq* ('patchwork') – combination, or selecting a single opinion from a number of sources or *madhahib*. The 'modernists' accuse the 'traditionalists' of *taqlid* while 'traditionalists' accuse the 'modernists' of *talfiq*. In the Sudan, in the context of the current discussion of whether or not and also how the country could be governed by an Islamic constitution, these principles have been a focus of discussion by the 'ulama and the legislators. The Judicial Circulars, issued by the Grand Qadi of the Sudan to specify points in the applied law, draw upon the established legal principles as the basis for their promulgation and *in toto* they represent an excellent example of *takhir* or selection of opinion from one school.

Qiyas and *istihsan* are closely related in that analogical reasoning should lead to an admirable solution. For example, the unlawfulness

of drinking wine was mentioned as the wine from grapes; does this then mean that wine from other fruits, dates for example, is lawful? Using *qiyas* you search for the fundamental principle behind the prohibition. If it is found to be intoxication then the general category of wines or intoxicants is to be outlawed. The preferred judicial opinion then regarding the consumption of wine and any potentially intoxicating drink is to bar all use of such beverages.

Likewise the current move in the Sudan to prohibit the advertisement, sale and consumption of liquor is one which is motivated by the legal principle of *istislah* in consideration of the public interest. The 'public' is clearly meant to be the community of Muslims and certain aspects of the proposed bill should not apply in the southern region of the Sudan which is predominantly non-Muslim. The legislation defines liquor as 'whatever intoxicates' and, if enforced, makes it an offense for a Muslim to manufacture, import or purchase liquor and, of course, to possess or consume alcohol.³ Punishments for violations of the law are flogging, imprisonment or fines.

The legislation entitled 'Liquor Prohibition Bill' received the approval of the Sudan's former single party, the Sudan Socialist Union (SSU), and was put into force in 1983 making the manufacture, sale or consumption of beer or alcohol an offence.

Another bill drafted and passed through the SSU Parliament dealt with *zakat*, which was also in the spirit of upholding the principle of *istislah*. *Zakat*, the Muslim system of public taxation, works on the premise of egalitarianism or common humanity in Islam and aims to correct social and economic inequities in the Muslim community. In fact *zakat* often represents little more than tokenism in the way of assistance to the poor, but is one of the foundations of Islam which gives inspiration to such legislation motivated by interest in the commonweal.

THE PLACE OF CUSTOM IN THE SHARI'A IN THE SUDAN

The recognition of '*urf*', custom, in the Shari'a is longstanding and was one of the early debates in the history of Islamic law. The debate ended in the recognition of '*urf*' as a source of law; however, the discussion was renewed in the development of the *madhahib* with the spread of Islam and the law into cultural areas previously not included in the dialogue (Mohammed El-Awa, 1973: 177). The subject is lengthy and important enough in the field of Islamic law generally, and for the Sudan specifically, that a special section is devoted to it.

While the coming of Islam resulted in great reformation of Arab society, it did not represent a revolution in the sense that pre-existing custom was overturned. On the contrary the Prophet made innumerable rulings, in his capacity as legislator, legalizing Arabian customary law (ibid). The pre-Islamic system of blood-money (*dia*) as compensation paid in the event of murder or accidental death was incorporated into Islam and Islamic law. Likewise elements of pre-Islamic marriage and divorce were adopted or amended; in fact in every area of the law there has been a formalization of customary law as it was practiced in Arabia before Islam. During the great period of the expansion of Islam the Arabian conquerors came into contact with differing cultural traditions, many of which were founded upon civilizations of great antiquity, for example in Syria, Egypt and Persia.

The legal question of the recognition of custom in the developing interpretations of *al-fiqh* resulted in the recognition of local traditions provided they do not contradict a point mentioned in the Qur'an and *sunna*. Women of noble birth were exempted by Malik from breast-feeding their children on the ground that doing so would be contrary to the custom of their social class. This Qur'anic injunction was viewed as sufficiently modified by custom to justify the exemption. Hanafi jurists were known to consult with local tradesmen and professionals about custom before issuing a *fatwa*, legal opinion, dealing with their business.

Gradually the scholars of the law came to understand the important role of custom in local application of Islam and the Shari'a and knowledge of prevailing custom became one of the conditions of interpretations, *ijtihad*. As a result of this recognition the jurists arrived at the consensus that when custom itself changes the legal view of that custom must respond accordingly. This constitutes a legal basis for the reformers who desire a closer correspondence between social practice and the law.

Mohammed al-Awa's essay on '*urf* in Islamic legal theory (1973) concludes that in order to be recognized custom should meet the following conditions:

1. it should be commonly practiced by the Muslim community.
2. it should be current; previous '*urf* is not admitted.
3. it cannot contradict an explicit provision of the Qur'an and *sunna*, for example wine-drinking.
4. '*urf* is discounted if there is an explicit stipulation between the parties which is contrary to custom.

The subject of the variety of custom recognized or recognizable in Islamic law is so vast that no general work on the subject has been compiled. In the Sudan alone the number of ethnic groups, with widely differing customs, which have embraced Islam is very large. With more than 500 distinct languages extant in the Sudan and important regional differences within its vast borders, the place of custom has assumed a major role in the Civil judicial system as well as the Shari'a. The Civil Justice Ordinance (originally enacted in 1900, repealed and re-enacted in 1929) states that in matters of personal law the basis of the court's decision should be:

- (a) any custom applicable to the parties not contrary to justice, equity and good conscience and which has not been specifically abolished by law or invalidated by a competent authority;
- (b) by Shari'a law, where the parties are Muslims, unless it has been modified by custom. (Saeed M.A. al-Mahdi, 1969: 226).

The Mohammedan Law Courts Ordinance (originally enacted in 1902 with the Mohammedan Law Courts Procedures following in 1915) acknowledges the absolute jurisdiction of 'Mohammedan' law in matters affecting the personal law of Muslims with judgement to be carried out in accordance with the Shari'a. Since Islamic law has recognized custom as a source of law from early times, there was no need in the Sudanese legislation to specify the role of custom in the application of Shari'a in the country.

The phrase 'justice, equity and good conscience' has prominence in the literature on law in the Sudan in the twentieth century since it is closely associated with British standards of justice.⁴ More than once in the modern legal history of the Sudan there has been a clash between English or Western standards of fairness in the law and local conceptions. The local custom of compensation, monetary or otherwise, for the loss of life or for physical harm caused by one person to another (*dia*) was recognized by the British as a utilitarian device for settling local feuds or 'inter-tribal' fights, but they would also except this rule in many instances and demand instead the full measure of punishment from the state. In cases which were deemed to be 'murder' rather than a local interpretation which might be called 'revenge killing', the colonial government would try the individual who had killed in retaliation for a death or serious infringement on land, water or animal rights, for murder, demand the death penalty, hang the unfortunate man and leave neither the avengers nor the avenged satisfied. The key to an understanding of the essence of *dia* is compensation for harm or damage so that the offending and offended individuals or groups can resume normal relations. Once the *dia* is paid traditionally there is a *sulh* (peace

agreement or treaty) made between the groups which restores the broken relations (cf. Fluehr-Lobban, 1976).

The argument can be made that the place of custom has been stronger in the modern Shari'a courts in the Sudan than in the application of civil law. The latter, having the 'justice, equity and good conscience' amendment attached to the interpretation of custom, left the field wide open to interpretation of local custom by the English judges who dominated the field during the colonial period as the conduct of business in civil law was in the English language. In the Shari'a however, where autonomy of the courts, the decision-making and appeals process was established shortly after the imposition of colonial rule, and where the conduct of business was in the Arabic language more or less exclusively, the influence of Western legal thinking could not be as strong. Problems in the system might be brought to the attention of the British Legal Secretary or the Provincial Governor by way of petitions which had to go through the burdensome process of translation from Arabic to English and then back to Arabic with the response. When this procedure did take place there is evidence in the records of a certain bias, perhaps stemming from an ignorance of the Shari'a, but clearly an effort to influence the law more along the lines of Western juristic thinking.

The strength of custom in parts of the Sudan is such that a survey of the application of law in the westernmost province of Darfur reported that customary law is predominant over both Shari'a and state law, such that if a plaintiff does not personally accept to be governed by Shari'a law even though he is Muslim, then the court will litigate the case in accordance with customary law. It is important to point out here that the customary law of many of the 'Arab' nomadic groups which are found in Darfur includes much that is recognized otherwise as Shari'a, for example *dia* which is sometimes referred to as *sadagat* in 'Shari'a Native Law'.⁵

A case involving the recognition of local custom regarding the dower in marriage came before the Shari'a High Court in 1973. A summary of its salient points brings out the fine distinctions between law and custom upon which some decisions must rest.

The plaintiff and respondent are wife and husband respectively. The wife-plaintiff initiated a suit in El-Obeid District Court alleging that her husband failed to pay her his debt of the remainder of the dower (*mahr*) of 10 cows, 'shart' and £S.10.00 the total amounting to £S.220. The wife brought as evidence her wedding certificate (*al-qassima*) made by an authorized *maa'zun* of El-Obeid where the *mahr* agreed to was £S.12.00, of which £S.2.00 was to be promptly paid and £S.10.00 deferred six months. The

wife further put into evidence that her marriage contract specifically gives her usufructory rights to the cows and that they ought not to be sold without her consent. The wife asked for full payment of her dower since this debt from her husband is still outstanding.

The husband challenged her ownership of the 10 cows on the basis of a local custom which only entitles the wife to ownership of the cows if she gives birth to a child; otherwise she is entitled by custom only to the usufructory rights of her 'shart', that is milk and milk products.

The District Court decided in the woman's favor on the ground that this particular aspect of local custom, limiting rights of childless wives to the dower, was not specified in the original marriage contract.

The husband then appealed the case to the Province Court in which he reiterated his defense, further alleging that the number of cows was seven and not ten. He brought witnesses who testified as to the local customs of the Kanana people to the effect that the husband's undertaking of a 'shart' confers benefit only and not title on the wife. The Province Court upheld the lower court's ruling.

The husband appealed the decisions of the District and Province Courts before the High Court which dismissed his application. Their judgment was that dower is an integral part of Muslim marriage. Like any part of a Muslim woman's property the wife has the right of exercising all manner of legal disposition of her dower without any restriction from her husband. 'Shart' in the western provinces is treated as part of the dower and the husband does not dispute the validity of the marriage contract, so there is no place for customary law once the dispute is covered by the Shari'a such as dower or *mahr*.

(Shari's High Court, Cassation Decree No. 1/73, 1 March 1973, reported in *Sudan Law Journal And Reports*.)

While it is clear from this case that the customary dower, 'shart', is accepted and recognized as part of the Muslim dower, *mahr*, the outcome depended on the supremacy of customary law or Shari'a law. The case was decided in favor of the woman, upholding the Shari'a right of the wife to the full disposition of her dower once it is agreed upon. By custom in the western provinces the dower may include animals or specific rights to them and since payment is not made directly to the wife in cash the animals intended as part of the *mahr* are identified publicly. The agreement regarding the dower at the time of the marriage contract did not place any conditions on the wife's entitlement to the

cows, for instance bearing children, and it is in the writing of the marriage contract that customary practice could and should have been introduced as a source of law binding on the couple. The husband did not do this (and we don't know if the wife would have agreed to this aspect of custom being part of her marriage contract) and, as such, customary practice was limited to the nomination of the dower and not its execution. Clearly the husband, in appealing his case all the way to the Shari'a Supreme Court, had the expectation that customary law would supersede all other interpretations of the facts. It is worth noting here that the Shari'a law giving a woman the full and unrestricted right to the disposition of her dower is a great deal more favorable to overall conditions for married women than is the local 'shart', which is more akin to the traditional brideprice. (See Chapter 5 on Marriage for a fuller discussion of the Islamic dower (*mahr*).)

Custom, which is recognized in Sudanese state law, includes not only *dia* but aspects of the personal law of citizens as well. The current status of *dia* in Civil Law (i.e. Penal Code included) is that in cases of culpable homicide or murder, where intent to kill is shown, the state becomes the aggrieved party and exacts its penalties according to the Sudan Penal Code (Sections 253, 254.) In cases of accidental death, where the parties accept *dia* as customary payment for injury or death, the court will make a recommendation as to the amount of the *dia* to be paid to which both sides must agree before amicable settlement is reached. An interesting point here is that the interpretation of the Civil Law regarding killing and *dia* is a close rendering of the Shari'a law on these points, which is of course not recognized as governing aspects of the criminal law. According to the *Shari'a* willful homicide is punishable by God and by retaliation; unintentional homicide is punishable by God and by the payment of *dia* as a compensation for the loss of life, but retaliation is not acceptable (Mohammed Kadri Pasha, *Code of Mohammedan Personal Law*, Section 199). Here the strength of custom is so great that *dia* in some form had to be included as part of the modern Civil Code. In certain large-scale inter-ethnic fights (called *shaklat*) oftentimes one of the few arenas of common language and ideology is within Islam and the restoration of peaceful relations becomes possible in the name of Allah and his prophet Mohammed (Fluehr-Lobban, 1976: 34).

In the Shari'a personal law the question of the application of law with respect to consent in marriage has involved a great deal of discussion of customary practice with respect to the final authority of the father in marriage regulations and the modesty of women in the Muslim Sudan. In both of these areas Maliki custom has exerted a dominant influence over the Hanafi law which is applied in the Sudan. Maliki custom, which was introduced into the Sudan with Islam itself, gives the father or

closest living male agnate final authority to negotiate a marriage contract for his ward. In 1933, the Hanafi tenet that a woman may contract herself in marriage was overturned in favor of the Maliki rule that the marriage guardian, the father, has sole authority in contracting marriage. This was done so that the law would be more in accordance with Sudanese Maliki traditions. The law was not amended until 1960 (Circular no. 54), responding to the growing political strength of the Sudan Women's Union, and even with the reinstatement of the Hanafi principle, the strength of the marriage guardian was retained, so that a valid Muslim marriage today in Sudan must have the consent of both the woman and her father or marriage guardian. Further legislation determined, according to Sudanese custom, how consent of the woman was to be known without her expressly stated consent, which might be thought to be immodest.

Questions of relevant Sudanese custom have arisen in conjunction with the development of the law of divorce because of cruelty (*talaq-al-darar*). The extension of the meaning of harm or cruelty to include insult and abusive language as well as physical harm is consistent with the fundamental Sudanese values of pride and personal dignity (Nordenstam, 1970). Insulting remarks made about one's religion or one's family, especially its female members, are recognized as mitigating factors in homicide cases and insult is the leading context in which homicide occurs in the Sudan (Fluehr-Lobban, 1976: 37). The determination of cruelty in the courts, based on the testimony of witnesses, neighbors, relatives, friends, is consistent with Sudanese residential patterns and lifestyle. The exceptions made to the Islamic rule of evidence (the testimony of two males or one male and two females) which allows the testimony of one upright female to prove that cruelty exists in a marriage is in accordance both with Maliki interpretation and with Sudanese cultural traditions which stand against personal abuse in human relations, including marriage. Likewise the confirmation of *darar* or cruelty between the husband and wife from any other court, including the customary courts (*'urfia*) which by their very definition uphold the customs of a people, is sufficient proof in a Shari'a court where a judicial divorce is being litigated (Circular no. 59, 1973).

The semantic history of *'urf* is traceable to the verb *'arafa*, 'to know'; therefore *'urf* becomes 'that which is known' (Farhat Ziadeh, 1960: 60). The transition from 'that which is known' to acceptable practice in a community and then its elevation to the status of custom having some legal impact is readily understandable. Moreover, the incorporation of local custom into Shari'a law, indeed aspects of state law in the Sudan, is a vital component adding to the flexibility of the application of the law in an ethnically diverse country. The restriction of local custom to

conform with or at least not contradict the basic principles of Islam and the Shari'a is a principle which must be upheld to defend the integrity of the religion. For example, if custom allows the drinking of intoxicants, or marriage to more than four wives, accepting its legitimacy would undermine basic beliefs of Islam. Otherwise custom falls into the category of things *jaiz* to which the religion and the law are neutral.

To conclude the discussion of the sources of Islamic Law, the principles of *siyasi Shari'a* and *ijma'* need to be addressed.

SIYASI SHARI'A

Siyasi Shari'a, good government by keeping to the Shari'a path, is a source of law which emanates from the ruler or sovereign (*hakim*) where there are no specific provisions in the Qur'an and *sunna* on a particular subject. The order which is issued should conform to the principles of Islamic law for it to be in the category of *Siyasi Shari'a*. This has been widely used in contemporary Muslim regions, where the Shari'a is not restricted to personal law alone, in the area of criminal law to affix punishment for newer crimes not mentioned in the sacred sources. The punishment for these offenses, such as embezzlement or illegal import or export, is *ta'zir*; it is viewed as a deterrent, not as revenge, and most jurists agree that *ta'zir* punishments issued by a ruler should be limited to flogging. This is a form of discretionary justice that can be applied by a judge as well and should not exceed the fixed limits of *hadd* punishments mentioned in the Qur'an and *sunna*. The Committee to Develop an Islamic Constitution in the Sudan used the principle of *Siyasi Shari'a* to recommend Shari'a-inspired substitutes for various parts of the Sudan Penal Code. Otherwise the work of the Committee has proceeded to recommend the institution of the Islamic *hudud* (pl. of *hadd*, literally 'limits' or 'borders') of cutting off the hands for theft and flogging for drunkenness.

The principle of *Siyasi Shari'a* was employed by President Numeiri, acting in his capacity as ruler enlightened by the Shari'a as well as military commander-in-chief in the case of the elimination of *bayt eta'a*. The enforced obedience of wives, backed by the use of the police force, was an institution oppressive to married women which some argue is not Islamic in inspiration and was imposed during the Turkish occupation. In 1970 the Numeiri regime abolished *bayt eta'a* and instituted a number of other reforms in the application of Shari'a including increasing maintenance payments made to divorced wives and dependent children. *Siyasi Shari'a* most properly comes from an Islamic ruler, however in this instance of an order issued by a secular government the critical feature is that the Shari'a is not violated.

IJMA'

Ijma', consensus or agreement, is a key to a grasp of the historical evolution of Islam in its political, theological and legal aspects (Goldhizer, 1981: 50). Whatever is accepted and agreed to in the entire Islamic community as proper is indeed proper. It is supported by the Hanafi doctrine that provisions in the law change with the changing times and by the Maliki position that new facts require new decisions. *Ijma'* is based on a *hadith* of the Prophet which said that God will not allow his chosen people to agree on an error – it has been described as 'Muslims shaping Islam' (Hidayatullah, 1968: xxii). Initially *ijma'* conveyed the meaning of consensus as to religious doctrine and practice of the companions (*saheban*) of the Prophet Mohammed and learned Muslims of early Islam. Later *ijma'* came to mean consensus of the learned scholars ('ulama) within a particular school and many would agree that this is the true meaning which is retained to this day. The earlier meaning of agreement within the community of Muslim believers has been de-emphasized because of the potential diversity which exists within the community and the possibility of admitting untutored opinion. *Ijma'*, interpreted strictly as the agreed-upon position on Islamic doctrine among the legal scholars alone, was perhaps the chief factor which contributed to the ossification which is said to have set in when the *bab-al-ijtihad*, the door of interpretation, was closed. Where differences of opinion between the schools persisted the principle of *ijma'* allowed that differences of view were indeed possible and legitimate and the four schools in effect agreed to disagree. It was thus that each of the four schools of law were regarded as equally orthodox interpretations of the Qur'an and *hadith* and therefore the will of Allah (Jamil Hanafi, 1974: 108). From the time of the fixing of *ijma'* among the jurists in matters of law and religious practice, all future jurists were known as followers or imitators bound by the doctrine of *taqlid*.

Some modern day reformers have held that there is the possibility of reinforcing *ijma'* by amending the law to conform to what has become contemporary Muslim practice, for example the majority of marriages remaining monogamous. Others view this line of thinking as contrary to what has become the established meaning of *ijma'*, with its narrow referent to the community of legal scholars. According to Sheikh al-Gizouli, discussion of vital issues with respect to contemporary doctrine in Islam is ongoing through a variety of forums including learned tracts and publications and periodic conferences of jurists and 'ulama from all over the Islamic world. One of the current questions on which consensus has yet to be reached concerns insurance (*tamim*), a subject which could not have been commented upon by the Prophet. There is

disagreement (*ikhtilaf*) among the jurists as to whether insurance, especially life insurance, is within the province of acceptable practice (*jaiz*), or whether such insurance policies do not violate the spirit of Islam which mandates submission to the will of Allah and are therefore reprehensible (*makruh*) or forbidden (*haram*). Those who oppose the concept of insurance policies, especially on one's life, believe they are a form of gambling with the future which only God determines. Islamic insurance companies have sprung up in response to this debate offering policies limited to theft of personal belongings solely. When some consensus is achieved on this issue of insurance, it will be a new example of the longstanding principle of *ijma'*, or agreement among the learned men of Islam as to correct belief or practice to be upheld within the Muslim community.

CONCLUSION

The sources of the law of Islam are not in and of themselves immutable, but they represent the established mode of interpreting the sacred religious texts and *hadith* upon which the foundations of the Shari'a rest. They are the result of centuries of scholarly debate and I have tried to show that they continue as vital elements not only in the history of Islamic jurisprudence but in the current science of *al-fiqh*. The degrees of obedience to the law are unchanging standards of conduct which apply to social and religious affairs of Muslims everywhere. They are not subject to customary variance except for things considered neutral by Islam. Yet we have seen that custom, as a source of the law, is a powerful instrument of the law to adapt itself to diverse local conditions. The schools of law, which emerged in the dynamic first centuries of debate and formed the science of jurisprudence, represent honest and equally relevant differences of view in matters regarding relations with God and with fellow humans. Although the schools have had their particular geographic orientations, they have never differed in matters of basic doctrine or belief and have therefore not developed into factions or sects. Sunni Muslims, whether Hanafi, Maliki, Shafi'i or Hanbali, form a great brotherhood which recognizes its origins in the *sunna* or practice of the Prophet and his companions (the *saheban*); if any opposition exists at all, it would be with Shi'a Muslims and their greater adherence to the practice of the immediate family of the Prophet. Of course for many Muslim fundamentalists, the greatest of all divisions is between believing Muslims and unbelieving non-Muslims, although the greatest respect is shown for the Prophets in the Judeo-Christian tradition who preceded Mohammed. This results in a special relationship,

later formalized in many aspects of the law, between Muslims and people of the Book, be it the Bible or Talmud.

NOTES

1. While there is agreement among scholarly sources as to the death dates of the early jurists, according to the Islamic lunar calendar, such a consensus does not exist in the calculation of equivalent dates in the Latin calendar.
2. This section is abstracted from discussions with Sheikh al-Gizouli during October 1979. Note also discussions in Schacht (1950) and Coulson (1964) along with the articles cited.
3. A copy of the proposed legislation was submitted to the Anthropology Department, University of Khartoum for comment. The Department responded that there would be a number of difficulties in implementing the proposed law, for instance, the presence of non-Muslims in the Northern Sudan and Muslims living in the South. Likewise they raised the question of the traditional 'native' beer, *merissa* brewed from sorghum, which is used as a food source among many rural and urban poor people.
4. See Zaki Mustafa, *The Common Law in the Sudan: An Account of the 'Justice, Equity and Good Conscience' provision* (Oxford, Clarendon Press, 1971) for a full treatment of the history of this juristic principle in the Sudan.
5. For a fuller discussion of the pre-eminence of customary law in rural Sudan, see *Report on Customary Law in Darfur*, Faculty of Law, University of Khartoum, 1964–65.

CHAPTER TWO

HISTORY OF ISLAMIC LAW IN THE SUDAN

PENETRATION OF ISLAM INTO THE SUDAN

The Nile Route

Although Islam spread rapidly to North Africa during the first century after its introduction in the Arabian Peninsula and to West Africa by the tenth century A.D., its major penetration into the Sudan (specifically the modern borders of the nation-state and not the generic term used for the western Sahara) was relatively recent, its establishment traceable to the sixteenth century. Its spread from the north in Egypt, which was conquered and Islamized in the seventh century A.D., was effectively blocked by the presence of the Christianized kingdoms of Nubia, which in themselves were the result of missionary endeavor from Egypt only the century before. There a treaty between the Emir of Egypt, Abdalla Ibn-Sa'd Ibn-Abisarih, and the Chief of the Nuba in 652 A.D. secured the region of Nubia in the Sudan as the *dar al-aman* (the region or place of peace) conforming to the classical Muslim division of the world into the *dar al-islam* (dwelling place of the Muslims) and the *dar al-harb* (the place of war, defined as non-Muslim). This unusual status given to the region by treaty established Nubia as a Christian outpost for seven more centuries, and only gradually did Muslim trade and teaching permeate the area. The Arabs in Egypt seemed to regard the First Cataract at Aswan as the southernmost outpost of their influence and were interested in Nubia as a tranquil area at their border to be intruded upon only for a supply of slaves (Trimingham, 1949: 76). Moreover the Nubians mounted a fierce resistance to their would-be Arab conquerors and the Emir of Egypt was advised to make peace with those people 'whose booty is meagre and whose spite is great' (Yusuf Fadl Hasan, 1967: 114).

The ultimate decay of Christianity in the Sudan had more to do with its lack of real assimilation among the Nubian people, beyond its status as the religion of the ruling elite. The spread of Islam up the Nile occurred not in a single, dramatic incident, such as an invasion or conquest,

but rather more gradually with the coming of Muslim traders and propagandists who settled and married amongst the Nubians, and with the fall of the major Christian Kingdom at Dongola in 1320 A.D., the obstacle of a Christian state religion was removed and the path was cleared for new influences.

The definitive Islamization of the Nubians was the work of missionaries, such as Ghullam Allah ibn 'A'id who settled at Dongola about 1360–1380 A.D., who taught the Qur'an and *fiqh* and founded a clerical family (Trimingham, 1969: 20). The change of religion among the Nubians took place in the context of the decay of Christianity as a state religion and through the absorption of an Arab clan, the Awlad Kanz, who pushed further up the Nile past Aswan. The Kanz assimilated the Nubian language and culture, but brought with them Islam as a way of life. It should be emphasized that these Arabs came not to plunder but to find a habitat suitable to their lifestyle, being pushed ever southward in this search. With their penetration, the Arabic language and culture of Islam spread along the indigenous riverain and rainland cultivators (*ibid*).

The Kingdom of Sinnar – The Funj

Arabization and Islamization followed relatively quickly after the fall of Dongola, but a distinctly Sudanese culture and character remained intact, and indeed certain ethnic groups, notably the Nubians and Beja peoples, retained their language and specific pre-Islamic cultural configurations. Movement spread up the Nile southward into the Gezira (the land between the White and Blue Niles – in Arabic, 'island') and westward into Kordofan and Darfur. In the eastern Butana the nomadic Beja groups were hostile to new settlement in their region and they disdained adoption of a settled lifestyle.

The kingdom of Sinnar in the Gezira, widely known as the 'Black Sultanate', became the first Muslim state in the Sudan and exerted its influence from the sixteenth to the nineteenth century. The Funj attracted and encouraged learned and holy men from the Hejaz (Arabian peninsula) and from Egypt who introduced Islamic theology and jurisprudence and, most probably, the Maliki doctrines which were to set the pattern for the practice of Islamic worship, social life and law in the Sudan. Maliki traditions, once introduced, were reinforced by pilgrims from West Africa travelling to Mecca for the performance of the *Hajj* where Maliki law and custom had been established in the region more generally known as *bilad al-Sudan* since the end of the eighth century A.D. Prior to the introduction of formal instruction in Islam, 'there flourished neither schools of learning nor reading of the Koran;

it is said that a man might divorce his wife and she be married the self-same day without any period of probation (*'idda*)' (Hasan, 1971: 76).

Various Hamaj–Nuba languages were spoken in the Funj kingdom and Arabic was known only within the upper class and ruling circles (Trimingham, 1949: 86). Islamic rule and later Islamic justice were likewise a monopoly of the elite. In the early period, apparently justice was administered directly through the political hierarchy of the sultanate, but later a system of Islamic judges and courts evolved through the progressive development of the office of *qadi* or judge (Spaulding, 1977: 413). The first Qadi of Sinnar, the capital city, was appointed by the Sultan Rubat who reigned 1614–43 A.D./1023–52 A.H.; however, customary law, under royal administration, continued to be strong. The legal texts and commentaries in the *Tabaqat wad Dafalla*, the best Chronicle of the Funj, indicate that a majority of Muslims in Sinnar followed the Maliki school, while a small minority were Shafi'i (O'Fahey and Spaulding, 1974: 73). Institutionalized Islam, including Islamic justice, catered to the needs of the merchant class who, though they were propagators of Islam, were also expatriates. These first Islamic justices contributed to the debate at the time over the use of tobacco and the continuation of certain customary marriage practices (Spaulding, 1977: 413, fn. 19).

By the eighteenth century a Qadirate or judicial system was in place with jurisdiction in all civil and many criminal matters. The *qadis* in Sinnar were responsible to the Great Qadi who was under the direct authority of the Sultan of the Funj. Only capital offenses and disruption of the public order were the exclusive domain of the sovereign. There were annual gatherings of the *qadis* at which time the Great Qadi could annul or sustain the decisions of the lower *qadis*. Throughout the period of the Funj the office of *qadi* and the national Qadirate remained an elite institution serving primarily the interests of the urban literati and the merchant class. There is little evidence that Islamic law had a pervasive influence among the peasant majority or throughout the loose confederation that was the Funj Sultanate. 'It was very difficult for an unschooled farmer without money to obtain justice from a court which presupposed literacy in Arabic and imposed cash fines and fees' (Spaulding, 1977: 426).

The kingdom of Sinnar had widespread contacts to the east in the Hejaz and down the Nile to Cairo. The great center of Muslim study, Al-Azhar University in Cairo, trained a number of Sudanese students in the Maliki school and they had their own hostel there known as the *Riwaq al-Sinnariya*, as it is known to this day.

Arabization and Islamization

Before the rise of the Funj Kingdom the dissemination of Islamic teaching came from Arab commercial contacts with the Sudan and the movement into the regions east and west of the Nile by Arab nomadic groups. Over a period of four to five centuries there was a gradual and peaceful penetration of Islam into the Sudan with some Muslims residing at Soba and in Dongola from the middle of the tenth century A.D. (Vantini, 1981: 203). The fall of the Christian church in Nubia is attributed to internal weakness and dissolution of these kingdoms rather than to Arab invasion and conquest, as had been the pattern in the first century of the Muslim calendar in North Africa. Certainly by the sixteenth century a culturally Arabized stock had emerged as a result of at least two centuries of close contact between the Arabs and the indigenous peoples of the Sudan (Yusuf Fadl Hasan, 1967: 176–77).

Certain learned men had a great impact on the expansion of an Islamic ideology and theology with its attendant infrastructure, especially in the form of the introduction of religious orders or *turuq* (sing. *tariqa*). The *turuq* which have predominated in the Sudan have been the Qadiriyya, Tijaniyya, Shadhiliyya, Mirghaniyya and Khatmiyya, the latter two having a distinctly religio-political character.

Mahmoud al-Araki of the Gezira studied Islamic law under two distinguished Egyptian jurists and returned to his home where he established a religious school and first introduced the systematic study of Islamic law. Sheikh Ibrahim al-Buladi, ethnically a Shayqiyya, also studied law in Egypt under the head of the Maliki school in Egypt, and he is credited with laying the foundation of the increased recognition of the Maliki interpretations in the Funj kingdom (Yusuf Fadl Hasan, 1967: 179–80).

Once established, the influences upon early Sudanese Islam came less from Egypt and more from the Hejaz as the Funj kingdom attracted a number of Meccan and Medinan scholars. The geographical location of the Sudan, being readily accessible to the holy places and on the path of the pilgrimage from western Islamic regions, brought the Funj ever closer to the heartland of Islam. The religious orders or Sufi brotherhoods combined with local saint worship exercised the most profound influence in conversion and in the rooting of an Islamic lifestyle among the masses of people. These orders tended to be highly localized and were not subject to any central religious or political authority. Indeed the present-day functioning of the *turuq* represents a vital, yet unofficial aspect of the practice of Islam in the Sudan, at times a thorny problem as their leaders answer to no higher authority than God. The *tariqa* leaders may be revered by the followers of the order, but they remain

essentially outside of the formal religious–political structure of contemporary Islam. Saint worship and the performance of a *dhikr*, or religious rite in commemoration of the saint, are the focal points of Sufi worship and strict adherence to the tenets of the Shari‘a may not be observed. The Sufis themselves, believed to have a close association with the deity, could, in a sense, stand outside of the earthly law. At least one *tariqa*, the Mirghaniyya, preached that the Shari‘a is the starting point of the Sufi path and the basis for progress in the religious life. Shari‘a is the ‘root’ and the *tariqa* is the ‘branch’ (Trimingham, 1949: 207). Today, visitors to the capital city of Khartoum can take a small excursion to the desert on the outskirts of Omdurman to see the popular *dhikr* of the *tariqa qadiriyya*, also known as the *rax al-darawish* (‘the dervish dance’), which is performed every Friday afternoon in commemoration of the local saint Hamad al-Nil. Although something of a tourist attraction these days, nonetheless the observer can get the feeling for the popular devotion to Islam through saint worship and the *tariqa*.

Darb al-Sudan – *The Sudan Road*¹

The impulse to make the long Saharan journey through the Maghreb, Egypt and the Sudan to Mecca in order to perform the *hajj* or pilgrimage is as ancient as Islam in West Africa. Islam in so-called Black Africa, known generally in the Arabic-speaking world as *bilad al-Sudan*, can be traced to the ancient kingdoms of Ghana and Mali and its successor state, Songhai, where it has been the predominant religion since the eleventh century A.D./fourth century A.H. In the nine centuries of Muslim West African history a number of Islamic states flourished including, in addition to well-known kingdoms already mentioned, Takrur, Kanem–Bornu, the Hausa city-states and the Fulani peoples, all of which constituted *dar al-Islam*. These states entered a period of decline and disintegration in the seventeenth and eighteenth centuries, and except for the empire of Bornu and the Hausa city-states, the spread of Islam was primarily the work of conversion through the very important *tariqa qadiriyya* and the continuous contact with Muslims through the trade in salt and gold which crisscrossed the Sahara.

The Maliki traditions, characteristic of West African Muslims and derived from the North Africans, do not allow many exemptions from performance of the *hajj*. Neither distance from Mecca nor financial considerations give sufficient cause not to undertake the pilgrimage (‘Umar al-Naqar, 1972: xvii). The organization of large numbers of pilgrims, travelling in some cases many years under great hardship to reach Mecca, has been a major feature of the Saharan region and its history. In the nineteenth century, no doubt as a result of unrest

generated by the Wahabist movement in Saudi Arabia, the journey to Mecca became more difficult and dangerous, and the opinion of the learned 'ulama began to change, preaching that it was possible to lead a good Muslim life without the performance of the *hajj* (ibid, p. 48). Apart from this period of exemption, the steady flow of pilgrims from west to east along a number of established routes has been a permanent feature of Islam in practice in Saharan Africa. Indeed the penetration of Islam into the Sudan (the geographical region) was first from the western route and later was fed continually by the trans-Saharan trade. Egypt, by contrast with the Maghreb or western North Africa, was a negligible influence in the central Sudan in earlier times (Greenberg, 1946: 3). Islam was further nurtured in the western Sudan by the early presence of an indigenous class of learned men, known locally as *ma'lam*, and indeed some of the earliest centers of Islamic teaching and learning were in the West African Muslim kingdoms, especially at Timbuctu in ancient Mali.

While royal pilgrimages, such as those of Mansa Musa and Askia Mohammed, are richly documented in the historical sources, the reconstruction of the pilgrimages made by the large numbers of West African Muslims remains more a matter of speculation. The pilgrimage routes mainly coincided with the trade routes of the Sahara, but there is some evidence that certain routes heading north were avoided by the 'black' or Sudanese Muslim pilgrims for fear of potential enslavement by the Arabs ('Umar al-Naqar, 1977: 100).

The Sudan Road (*darb al-Sudan*) refers to a generalized west to east route, perhaps originating in Air in the northwestern Sahara passing through Timbuctu, Hausaland and Bornu to Darfur. This is also known as the 'old Hajj route' (ibid, p. 105). Apparently trade caravans timed their departures in accordance with the pilgrimage season and traders might seek the safety of a large caravan on the way to or returning from Mecca. The main trade route out of Darfur, the *darb al-arab'in* or 'forty days' road, ran from al-Fasher to Assiut in upper Egypt and this was also a pilgrimage route. The 'forty days' road' is still very much in use in the Sudan today. Darfur had a reputation for being hospitable to pilgrims and a later route from Darfur through to the Nile was probably initiated by pilgrims travelling from this region. The more expensive desert journey was left to those travelling with some capital to purchase camels for transport, while the more impoverished pilgrims in the eighteenth and nineteenth centuries had no choice but to seek the charity and protection of Muslim peoples and Quranic schools along the Nile.

Such journeys from western Muslim Africa could last up to three years or more and means of support for the largely poor groups of pilgrims needed to be found in the charity of the local populations,

in trade or in securing temporary local employment. In contemporary Sudan a major source of the supply of temporary migrant labor for the agricultural and cotton fields of the Gezira are the 'Fellata', the local term for Nigerian and West African immigrants, many of whom are pilgrims making their way to the Hejaz for the pilgrimage. There also seems to have been considerable trading activity by the pilgrims all along the route.

The influence of travel abroad and contacts with other peoples upon the pilgrims and, in turn, their influence on local culture cannot be emphasized enough. Familiarity with the vehicular languages, Hausa, Arabic and others, and the pilgrimage journey itself came to be regarded as a completion of one's education ('Umar al-Naqar, p.125). The steady stream of pilgrims across the Sudan from about the nineteenth century A.D. with their Maliki traditions of worship undoubtedly had the effect of introducing and later reinforcing certain traditions in the Sudan. A cultural complex of elements common to Sahelian Muslims developed in the process encompassing both religious practice and cultural expression. In addition to the absorption of the universal elements of Islam, known as the Five Pillars including the testimony of faith, prayer, fasting, almsgiving and performing the *hajj*, additional elements came to characterize what the Hausa call 'the Moslem way' (Greenberg, 1946: 11). These include the drinking of the ink washed from the wooden writing tablet (the *loh*) Burckhardt (1822) mentions on which Quranic verses have been written, a tradition which is probably very old and continues as a vital presence among western Sudanese today. Also the wearing of some sort of turban for men and a long shirt-dress (called *taqia* and *'imma* for the turban and *jellabiyya* for the long gown in Sudanese Arabic) has become characteristic although a relatively recent development in North and West Africa.

While the Shari'a was known and revered, a system of courts presided over by *qadis* could only be found in the major cities of the Islamic kingdoms. Thus courts where *fatawa* (opinions) were issued by learned holy men are mentioned for Timbuctu, Gao, Kano, Djenne and others from medieval times. Otherwise the Shari'a was undoubtedly interpreted as the correct Muslim way and practice would have been monitored by the larger community of worshippers of which an individual was a part. The strength of community sanctions would have been very great indeed. Islamic practice would have varied locally. For example, Maliki and Shafi'i law both recognize *dia*, customary compensation for the loss of life; however, the categories of individuals for whom compensation may be paid and the amount of *dia* payments vary according to local custom despite the standard allowed in the Shari'a of 100 camels for a freeborn Muslim male and half that amount for a woman (Lewis,

1966: 47). Matrilineal societies have not been as resistant to the spread of Islam as might be expected and strongly patrilineal societies have not always yielded to Muslim conceptions of inherited wealth. The Beja of the Sudan exempt the Shari'a as a source of law regarding such property considerations. Moreover the status of women under Islam in Africa is neither uniform nor static and we will return to this point to treat it at greater length. It is fair to say at this juncture that public performance of rituals associated with Islam characteristically does not involve women in this Sahelian and North African cultural complex.

In the absence of settled life and a class of 'ulama to instruct and interpret for the Muslim community, certain non-Islamic customs may have continued without interruption. There is some evidence to suggest the contrary view that the Shari'a holds a prominent status in areas undergoing the process of Islamization (Lewis, 1966: 46). Where Islam is spreading and the Shari'a courts exist alongside customary courts there may be a preference for the Islamic courts because of the prestige and authority associated with them. The position of the Shari'a in the state is, of course, critical to its perception and use at the local level. Also pragmatic considerations come into play where customary and Islamic courts exist side by side as to which law serves a desired end.

While Islam probably first penetrated the Sudan from the North and East, the character, flavor and sub-culture of Islam in the region is of West African derivation. This is due to the continuous flow of migrants and pilgrims from West to East, many of whom settled in the Sudan, retained amongst themselves the longer established tradition of West African Islam.

ISLAMIC LAW IN THE MODERN PERIOD

The Turkiya – Ottoman Occupation: 1820–84

Mohammed Ali, the architect of modern Egypt, had a taste for the mineral wealth and abundance of slaves to be found in the Sudan. In the early nineteenth century no Sudanese kingdom or confederation of states was powerful enough to hold back the invading and occupying armies of Mohammed Ali which arrived in 1820. Although the Sudanese mounted a heroic resistance, celebrated in story and song to this day,² the Shaygiya and Ja'aliyin fell to the army of Ismail, son of Mohammed Ali, as it plundered its way south to Sinnar. A symbol of the resistance of the Sudanese was the assassination of Ismail himself at the hands of Mek Nimr as the conquerors were hosted by the Mek or king at a banquet. This occurred in Shendi as the army was pushing its way southward into the central Sudan. The second Turco-Egyptian army

under Ismail's brother, Mohammed Bey al-Daftardar, fought its way through the Bayuda desert to Kordofan and thus began the Ottoman occupation and economic plunder of the Sudan. Khartoum, at the confluence of the White and Blue Niles, became the capital and the center for a vast slave trade that penetrated deep into the south of the Sudan (Trimingham, 1949: 92). Turkish rule in the Sudan was notorious for its brutality and its crass commercialism. The lure of profits even led to certain violations of Islamic practice, namely the ban on enslaving Muslim peoples by fellow Muslims.

An administrative infrastructure was necessary to direct trade and foster political and legal relations in this Ottoman colonial outpost. The modern nation of the Sudan was forged in the process, and the first nationwide legal and political administration was put into place by the Ottoman Turks. The *Tanzimat* reform of 1850 in the Ottoman empire organized the administration of the law into a commercial code, largely of European origin, and a criminal code, that were administered through a system of secular courts (*nizamiya*), while the Shari'a courts, applying Hanafi law, were confined to the law of personal status and family relations. It was with the Turco-Egyptian conquest and occupation of the Sudan that the position of Islamic law as a personal status law was instituted. A legal-political vocabulary was introduced which lasted long after the Ottoman occupation into the British colonial occupation, the latter in many ways being an extension of the former. Such terms included *daftar* (record book, especially for tax collection), *wazir* (ruler or head), *nazir* (local chief).

The first colonization of the Sudan had both retrogressive and progressive aspects; the subjugation of the Sudanese people represented a dark period for a host of previously autonomous peoples, yet in that complex dialectic the Sudanese nationality was born. Likewise, while Turkish rule was a bitter experience for the Sudan, the colonial episode brought Sudanese Muslims more closely in touch with orthodox Islam and the great centers of Islamic learning. The Sinnariyyin or Sudanese students at Al-Azhar University in Cairo were later to play a role in the Mahdiya (Holt, 1970: 22). A certain richness regarding the Shari'a was laid down in this period in so far as the Hanafi law was introduced to a people who had previously followed only the traditions of the Maliki *madhab*, however without its application in a system of courts. The co-existence of Hanafi and Maliki law in the Sudan from the nineteenth century laid the foundation for the twentieth century choices between the two which have characterized changes and development in the Shari'a for the past sixty years.

Unfortunately, we have no study to date of the administration of law by the Ottoman Turks in the Sudan. It is known that in 1848-49

Mohammed Ali, Khedive in Egypt, reorganized the administration of law in the Nile Valley by creating five Judicial Councils, four in Egypt and one in Khartoum, each applying Hanafi law and each reporting to a Central Judicial Council in Cairo. The Shari'a courts continued in theory to be courts of general jurisdiction, but in practice their work was gradually being limited to personal status cases and those involving land (Ziadeh, 1968: 16).

The Mahdiya – 1884–1898

In 1819 when Mohammed Ali undertook the conquest of the regions south of Egypt, there was no power on the Nile capable of resistance. The kingdom of Sinnar was near its demise and the riverain peoples lacked a more sophisticated political organization beyond the tribal level. After their subjugation the Sudanese people fell prey to mysticism and the power of the local fekis, or holy men, rose along with the mystical orders. The Mahdi built his movement upon this mysticism and the very real political grievances which the Sudanese harbored against the Turks and Egyptians.

The Turks and Egyptians administered the Sudan through a system which was later to be known as 'indirect rule' under the subsequent British occupation. 'Tribal' sheikhs became the instruments of the empire, and the Mahdist uprising was at once both a rebellion against the Turkish and Egyptian rulers and their local collaborators. Particular hatred was directed against the Mirghani family and its Khatmiyya sect which favored Egyptian rule. Galvanizing and coalescing Sudanese opposition to foreign domination and the hope for religious deliverance was Mohammed Ahmed, the Mahdi or 'Expected One' from Dongola.

The successful, in many cases the unobstructed, expansion of the Mahdi's armies from Dongola south and east and west in the Sudan was an episode of unparalleled resistance against imperialist designs in Africa. Ottoman institutions were rebuked and the Mahdi endeavored to instruct his followers (*al-Ansar*) to follow the pure, unsecularized Shari'a. As early as 1881–82 (1299 A.H.) he issued a proclamation asserting that the spoils of war, according to the rule of the Shari'a, belong to the Mahdist community as a whole and not to individuals (Holt, 1970: 125). A Treasury (*Bayt al-Mal*) was organized and a Treasurer appointed in 1883/1300 A.H.

The extension of Mahdist rule was accompanied by the imposition of taxation authorized by the Shari'a (*al-zakat*) which was levied on cattle and grain. With the decisive victory at Khartoum in 1884, Mahdist rule in the Sudan is said to have begun although large areas had been emancipated from 1881. From 1884 Mahdist institutions were laid down

mainly by the Khalifa Abdullahi who succeeded the Mahdi after his untimely death in 1885. The only law in force in the Mahdist state was the Shari'a with an established Judiciary and a Chief Justice (*Qadi al-Qudah*) and lesser judges appointed to courts in Omdurman, Kassala, Northern Province, Kordofan and Sinnar (El-Fahal el-Tahir Omer, 1964: 168). Throughout the reign of the Khalifa Abdullahi, while the Judiciary functioned, albeit in a politicized context, decisions and decisions on appeal regarding civil and criminal matters as well as personal status concerns were made according to the Qur'an and *sunna* only. A major transformation in the class character of legal administration occurred. The monopoly of the law by the merchant class and the elite was overturned so that the simplest man could have his complaint heard.

Mahdist legislation was aimed at modifying or rendering illegal Sudanese customs which were thought to be contrary to the Shari'a. The most forceful attenuation of women's role in the society and the seclusion of women can be traced to Mahdist interpretation of the Shari'a. A series of proclamations regulating the behavior of women were issued including bans on women going about bareheaded and unveiled, the forbidding of women to go out in public on the streets or in the market place, and the limitation of contact between the sexes (Holt, 1970: 130–31). Before too harsh a judgment be passed on this legislation bear in mind that the Mahdist movement was a social revolution as well as political, one of whose aims it was to purify a society grown secular and corrupt under the Turkish order. *Mahr*, dower, was limited to a maximum of 10 Maria Theresa Dollars for a virgin so that expense not stand in the way of legitimate marriage (ibid). Non-Islamic superstitions were campaigned against in an effort to purge the society of its backwardness and introduce the light of rule by the Shari'a alone.

The supreme judicial office was held by the Mahdi himself and later the Khalifa Abdullahi, but power to hear cases and make decisions was widely delegated. The khalifas, province military governors and the commissioners were all capable of acting as judges. One official, the Qadi al-Islam, was appointed by the Mahdi as a special legal representative of the Mahdi as Imam, or spiritual head of the state. His task was to see that decisions took place solely on the basis of the Qur'an, *sunna* and the proclamations of the Mahdi. The interpretations of *al-fiqh* or Islamic jurisprudence were laid aside and there was no room for deviance from the orthodoxy of these sources thereby excluding essentially the four schools of Islamic law. The actual historical personage, Ahmed 'Ali, was Qadi al-Islam for twelve of the fourteen years of Mahdist rule, but in 1894 he fell out of favor, was arrested, disgraced and died in prison. His successor, Al-Hussain w. al-Zahra, suffered a similar fate because he refused to hand down a decision in

favor of the citizens of Dongola and against the Ansar there who were alleged to have committed offenses against the people (Holt, 1970: 210, fn.2). After this the office of Qadi al-Islam seems to have disappeared and the list of Mahdist functionaries drawn up at the reconquest does not mention anyone holding the office. The head of the law courts was listed as *Qadi al-'umum* with six deputies (*al-nuwwab*) cited.

Unfortunately, little has been uncovered or written about the day to day administration of justice during the Mahdiya. Secondary law courts, for example market courts in Omdurman, filled a special function to maintain social order, and apparently worked closely with the commandant of police. A Treasury court heard cases involving fiscal matters and provincial courts seemed to work in close alliance with the military governors, with the exception that their decisions had to be confirmed in Omdurman. From the point of view of jurisprudence, the atmosphere was one of strict adherence to the purity of the sources of the Qur'an and *sunna* and the Mahdi's proclamations, and the flexibility that the various schools in the Shari'a allow was absent. It is noted that Sudanese men who were learned in the law having studied at Al-Azhar University in Cairo were not necessarily welcome as judges under the Mahdiya where the emphasis was on absolute observance of the law rather than its intellectual interpretation. The Hanafi law, with its close relationship to the Turkish occupation, would have been isolated and relegated to unimportance and the stronger Maliki traditions of the Sudanese might have been allowed to surface, provided they did not contradict the purifying measures of the Mahdist teachings.

The sharpness with which the law was used to prosecute political offenders, defined as apostates from Islam, is illustrated in the following case, the text of which is on display at the original house of the Khalifa Abdullahi in Omdurman which is now a Museum of the Mahdist period.

Now whereas the Khalifa Mohammed Sherif Hamed appeared as an antagonist to Khalifa El Mahdi (Peace be upon him), being an enemy and opposing and disobeying until he started war and drew the sword on him without taking into account the fact that his actions injured the religion and divided the stick (power) of the Muslims. After all this a delegation of Muslims brought him before them and made him swear on the Book of God, and so he swore and gave his word of honor not to go back and do what he had done in the past and to be under the sight of the Khalifa El-Mahdi (Peace be upon him) and be like the followers

of the Mahdi in humbleness and obedience and cleanliness of heart. And he appeared before the Khalifa El-Mahdi (Peace be upon him) who accepted him in spite of his crimes and evil deeds; pardoned him and met him with kindness and grace.

After all this, he broke his oath and went back to his opposition and disobedience in addition to giving up Friday and community prayer. The community of the Mahdi's followers consisting of Judges of the Muslim Law, Sherifs, 'Omdas and notables asked him to explain his deeds; and he met them with the worst of speech and pronounced words which made events go from bad to worse, saying that the victory of Mahdism is under his foot, and so on. But they warned him with nice words to withdraw from his attitude; read to him the Proclamations of the Mahdi in regard to the appointment of the Khalifa Abdullahi. And so he showed his regret and repentance; but as he formerly broke his oath and ceased his repentance, the judgment of the Committee was given in accordance with Muslim law by putting him in prison. Had it not been that he showed repentance his punishment would have been more severe, and that was very clear to the followers of the Mahdi whose seals and names follow hereunder, and who will give evidence before God.

(The judgment was witnessed by 46 men and was issued in the Year of the Hegira 1309 -ca. 1890 A.D.)

Exhibit Number K283, Khalifa's House and Museum, translated by Suleiman Dawood Mandil, 1930.

The judgement was printed and distributed to the public in the mode of the day using the technique of lithograph stone, a stone carved with the message, inked and printed. The background to the case of treason is that the Mahdi appointed his successors during his lifetime including the Khalifa Abdullahi, the Khalifa Wad Helu and the Khalifa Mohammed Sherif Hamed. Although a brilliant member of the Ansar he did not succeed because of his young age, the Mahdi preferring the maturity of Khalifa Abdullahi. Mohammed Sherif Hamed resented this and on two occasions he openly defied the Khalifa Abdullahi.

The Khalifa Abdullahi maintained the Mahdist state until 1898 when the independent Muslim polity was crushed by the Anglo-Egyptian forces led by Lord Kitchener whose gunboats ripped holes in the Mahdi's tomb and the bones of the Mahdi were thrown into the Nile.

The period of theocratic rule had its lasting effects on Sudanese society and certainly on Sudanese politics in the twentieth century. The attitude of the British colonizers toward the Shari'a and other Muslim institutions that were not overtly threatening, was one of conceded autonomy

and some of the gains made during the Islamic Republic were able to be consolidated.

The Colonial Period 1898–1956

The Mahdist state lasted for fourteen splendid yet turbulent years. Because of continual threats from the would-be colonizers who abhorred the existence of the independent enclave in Africa, the state was in a perpetual condition of harassment from the outside and was subject to 'purification' purges internally. What we have seen in terms of the development of the law is only an embryo of what might have resulted had the Mahdist state not been a thorn in the side of the imperial powers, Ottoman Turkey and later Great Britain.

The story of the 'revenge' for the death of Gordon Pasha who died at the hands of the Ansar in Khartoum in 1884 and the reconquest of the Sudan in 1898 has been chronicled many times, not the least of which was by the war correspondent, Winston Churchill. The defeat of the Mahdist forces at Omdurman assumes that there was warfare in the true sense; in fact it was a massacre and the Mahdist state lay in ruins along with thousands of the dead Ansar who remained absolutely loyal to the Khalifa.

Between 1898 and 1902 the British began the process of establishing the colonial entity as the Anglo-Egyptian Sudan, ruled by Great Britain using Egyptian and Sudanese nationals as local administrators under their policy of indirect rule. The Governor-General of the Sudan was always to be English during the colonial period, as were many of the high-level government officials, including the important post of Legal Secretary in the Sudan Judiciary. Lower-level administrative posts were held by Egyptians and increasingly by Sudanese as the colonial episode went on.

The attitude of the British toward Islamic law varied considerably from one colonial entity to another. This was partly due to genuine differences in local conditions, but also because each territory seems to have tackled this question in almost complete isolation (Anderson, 1969: 42). Generally Islamic law was recognized as having jurisdiction in personal affairs, such as marriage, divorce, and inheritance, but its status within the larger colonialist state reflected no particular, clear policy on the part of the British with respect to the Shari'a. Islamic law was treated more as a variety of 'native law and custom' in parts of British controlled West Africa, and more as a distinct and separate system of law in parts of colonial East Africa, but this was not systematic. In Zanzibar Islamic law was proclaimed to be the 'fundamental law', although it was supplanted in all criminal concerns, evidence and much else by statutory law. In Uganda there were no Muslim courts

and in Tanzania the judges were free to apply Islamic and customary law side by side in the courts. Far more surprising is the case of Northern Nigeria, where Islamic law has been more consistently enforced than anywhere else in the world outside of the Arabian peninsula; it was applied exclusively as native law and custom until 1956. Since then there has been the distinction, particularly in matters of appellate jurisdiction, between cases where Muslim law should be exclusively applied and where customary law prevails (Anderson, 1969: 43–4). Of course, the relegation of Islamic law to a variety of customary law did have the effect of allowing the natural mixture of Islamic and customary legal principles in areas where Islamic law was not so entrenched, and it allowed for the recognition of Maliki Muslim traditions in staunchly Islamic areas.

The Islamic court system was reconstructed for British colonial purposes under the Mohammedan Law Courts Ordinance of 1902 and later the Mohammedan Law Courts Procedures Act of 1915. The 1902 Ordinance recognized the ‘Mohammedan’ courts as a separate system of courts, with an independent appeals system, as distinct from the Civil court system which applied an English-based civil law and a criminal code essentially a near verbatim adoption of the Indian Penal Code. The 1902 Ordinance states that:

The Sudan Mohammedan Law Courts shall be competent to decide:

- (a) any question regarding marriage, divorce, guardianship of minors or family relationship, provided that the question was concluded in accordance with Muslim law or all parties are Mohammedans
- (b) any question regarding waqf, gift, succession, wills, interdiction or guardianship of a lost or interdicted person provided that the endower, donor, deceased, interdicted or lost person is a Mohammedan
- (c) any question other than those mentioned where parties, Mohammedan or not, make a formal demand signed by them asking the court to entertain the question and stating that they agree to be bound by the ruling of Mohammedan law
- (d) The Grand Kadi shall from time to time, with the approval of the Governor-General, make regulations consistent with this ordinance regulating decisions, procedure, constitution, jurisdiction and functions of the Mohammedan law courts.

(The Sudan Mohammedan Law Courts Ordinance, May 1902 in *The Laws of the Sudan*, Vol. II, Title XXVIII: Sharia, Haycock Press, London, 1955)

There is a unique feature to this authorization for the application of Islamic law in the Sudan and that is the granting of the authority to the Sudanese Grand Qadi to issue regulations which would affect the direction of the development of the Shari'a during the entire colonial period. During the major portion of the Condominium rule in the Sudan nearly every Grand Qadi was an Egyptian national appointed by the Governor-General of the Sudan and ultimately subject to his authority. In 1915, in the Mohammedan Law Courts Procedures, section 53 provides that Hanafi law should be applied 'except in matters in which the Grand Qadi otherwise directs in a judicial circular or memorandum'. Between 1902 and 1979, 62 of these Circulars were issued, and where they departed from Hanafi teachings on a subject, they issued directives derived from the Maliki school. The Circulars over the years have provided the major vehicle for reform and for adaptation of the principles of the Shari'a to local conditions in the Sudan. The mainly Egyptian Grand Qadis who occupied the office until 1956 when the first Sudanese Grand Qadi was appointed by the new independent regime, have been characterized by Anderson as 'enlightened' (1969: 48). They engendered a close relationship between the 'ulama of Egypt and the Sudan and a number of reforms were either passed in Egypt and then applied in the Sudan, or on occasion they were experimented with in the Sudan and not applied in Egypt until years later. The Sudanese Grand Qadis carried forward this tradition of enlightened jurisprudential thinking and the period from 1960 to 1979 witnessed a number of important reforms in the law regarding marriage, divorce and *waqf*.

The principle upon which the idea of the Judicial Circular rests is one which permits the ruler to deviate from the view held by the dominant legal school to be applied when the public interest requires it. Over the years the Circulars, which are the product of collective discussion among the Shari'a judges of the High Court and are issued through the office of the Grand Qadi, have used minority opinions of the Hanafi school, the dominant opinions of the Maliki school or they have resorted to the opinions of early jurists before the schools crystallized and they have used the technique of *tafiq* or 'patching', i.e. taking opinions from different schools and combining them to form a unique view on a particular subject (Anderson, 1969: 48).

The English took something of a *laissez faire* attitude toward many of the internal developments of the Shari'a during its period of rule, however there is evidence that they exerted considerable pressure in attempting to revise or reform the law with respect to child marriage, the required obedience of women in marriage and aspects of the inheritance law involving the transfer of wealth in the form of immovable

property, particularly land and buildings. They no doubt proclaimed the status of the Shari'a to be independent so as to keep the once rebellious Muslim population from finding grounds for further outbreaks.

JUDICIAL CIRCULARS ISSUED FROM THE OFFICE OF THE GRAND QADI 1902–1979³

Basic documentation of the twentieth century history of the Shari'a in Sudan is contained within the Judicial Circulars which have been issued from the office of the Grand Qadi from 1902–1979. During the colonial period and in the post-independence period the Circulars provided a unique means for modifying and adapting Shari'a law in the Sudan, drawing on opinions of the Hanafi and Maliki schools of juristic interpretation.

The Judicial Circulars represent a unique means by which the Shari'a has been applied in the Sudan which has been sensitive to customary Muslim practice and reflective of change in the thinking of the 'ulama. In a number of instances the Maliki view was officially promulgated on a particular legal point because of the closer correspondence between Maliki practice and Sudanese custom (e.g. Circular no. 35 which adopted the Maliki provision regarding guardianship in marriage and was later repealed). In other cases, as a result of the close relationship between the 'ulama of Egypt and the Sudan a dynamic was established between the two whereby change was sometimes introduced in Sudan first and followed in Egypt. At other times change in Egyptian legislation anticipated developments in the Sudan, and of course the highest authority in the Shari'a during colonialism most frequently was an Egyptian appointed by the British. An example of the former situation is Circular no. 17 (ca. 1915) which allows maintenance to be paid from a husband's property; here the Sudan was in the forefront of this change. Circular no. 41 issued in 1940 restricts the potential for abuse of unilateral divorce by the husband and this change followed reforms made in Egyptian legislation and the Family Reform Law of 1929.

Shari'a established within Sudanese law 1906–1930

As might be expected, the early Circulars, 1908–1930 (nos. 1–31), deal with matters of procedure and administration of the Shari'a courts themselves. (See nos. 6 (1906), 9 (1929), 18 (n.d.), 20 (1916).) The Circulars were intended for use by the Shari'a judges in applying the law and developed the specialized function of interpreting and explaining the law to its practitioners. Another early concern reflected the British

interest in land, its control and the resolution of conflicts over land. Indeed in the English restructuring of the legal system, land cases were excepted from adjudication under customary law and fell under the British-administered civil law (Akolawin, 1970). In the Shari'a, there was a concern with the registration of land for adjudicative purposes (nos. 4 (1905), 22 (1916)) and the legal methods for the inheritance of land (no. 12) and the transference of property in inheritance or for *mahr* or *hiba* (nos. 21 (1916), 22 (1916), 29 (1927)). Of special concern was the procedure for the transfer of property, especially inherited lands for cases involving persons from Egypt but resident in the Sudan and vice-versa (nos. 8 (1908), 15 (1914)). Other Circulars directed the judges to recognize documents from other Shari'a courts in Eritrea, Egypt (no. 9 (1929)) and from the Hejaz, Saudi Arabia, if the British authorities recognized these decrees (no. 23 (1918)). The last amendment, that such decrees were recognized if accepted by the British authorities, gives some indication of the degree of control exerted on the Shari'a by the colonial government. Every Judicial Circular issued from the office of the Grand Qadi had first to be approved by the Legal Secretary, a high-level colonial officer in the Sudan Judiciary appointed by the Governor-General of the Sudan.

Divorce Reform

Apart from the foregoing questions of administration and procedure in the courts as well as property issues, a number of Circulars were issued in this period which had a more direct social impact as well. Some sought to clarify the law, others actually to reform it. Pre-eminent among the latter was Circular no. 17 which, at the time of its issue (ca. 1915), had a major impact on the reform of divorce in the Sudan and in the Muslim world. The spirit of reform no doubt began with the Ottoman changes in the family law in 1915 and 1917 which granted the right of judicial dissolution of a marriage to women (Anderson, 1970: 42). This reform was followed in a number of Islamic countries including Lebanon, Jordan, Syria, Egypt, but the Sudan was in the vanguard of legal change for many years, especially with respect to certain types of divorce.

The first section of Circular no. 17 sets out in detail the conditions under which a woman can apply in court for *Nafaqa* (maintenance) when her husband is absent. The Circular elaborates section 53 of the Mohammedan Law Courts Procedures (1915) and specifies the procedures to be followed to obtain maintenance payments from the absent husband whose whereabouts are known and who, therefore, can receive a summons, and for the absent husband who cannot be contacted. The procedures for the wife to claim divorce because of non-support are outlined as is the process by which a husband can be declared legally

dead after a period of four years from the date of the court's investigation of the case and the wife is thus free to marry again after she has passed her *'idda* period of waiting.

A number of points should be noted here. First, a certain spirit of reform existed with a desire to relate the Shari'a in the twentieth century to realities in Sudan. Secondly, the move for setting forward the legitimate bases upon which *nafaqa* may be awarded to women is an indication that such cases were no doubt increasing in frequency and questions regarding *nafaqa* claims where the husband is not present were being raised by the Shari'a judges at the time. The growing dislocation of the Sudanese family is thus intimated. Even in contemporary Sudan there is a social stigma attached to *nafaqa* cases because the presumption is that the family has faltered in its responsibility to maintain one of its own. However, the *nafaqa* cases between a husband and wife are clear in terms of the husband's culpability and the effect of Judicial Circular no. 17 was to delineate the circumstances under which a wife could make such a claim. This strengthened the woman's position and, no doubt, had the intended effect of encouraging husbands away from home to maintain their wives properly.

The second major part of Circular no. 17 deals with an important reform in the interpretation of the divorce law, which represents a first recognition of the right to judicial divorce for women on the grounds cited. Divorce because of fear of temptation (*talaq khof al-fitna*) and because of cruelty (*talaq al-darar*) are explained as two conditions which permit a judicial execution of divorce. In the former case, a woman who has been deserted by her husband for more than a year can ask that she be divorced because she fears that she may be tempted to an illicit relationship having been denied the support and normalcy of maintaining marital relations. Divorce on the ground of cruelty is here recognized as physical abuse causing marital life to become intolerable and the divorce rendered is irrevocable. This definition would be expanded to include mental cruelty in the early 1970s. The Sudanese law of 1915 is the first recognition of cruelty as a ground for divorce in Muslim law.

The final section of the Circular deals with marriage arbitration (*al-tahkim*) which should be sought in cases where the wife is complaining of persistent marital discord. Two arbiters, one from the husband's and one from the wife's side, should be appointed by the court and instructed in the rules regarding obedience in marriage (*ta'a*). Depending on the source of the disharmony, they can recommend reconciliation, divorce by the husband or judicial divorce granted to the wife.

The reforms mentioned here were inspired by matters which had been

under discussion and debate both in the Sudan and in Egypt for some time, but which antedated the same reforms in Egypt by four to five years (the Egyptian legislation came in 1920). The reform regarding *nafaqa* represents a departure from the Hanafi rule which permits the extraction of maintenance payments from the husband's property only if he is absent. Thus the husband who is present, but fails to maintain the wife except at the poorest standard, is liable to be divorced by his wife, and the Circular here draws upon Maliki legal opinions regarding maintenance. The reform permitting divorce for fear of temptation was amended slightly by Circular no. 28 (1927) which stated that this was applicable only in cases where a claim for divorce because of lack of *nafaqa* had not been registered, since the two claims are separate (Anderson, 1955: 313). In both the cases of divorce for fear of temptation and the recommended use of marriage arbitrators, these changes antedated similar developments in Egypt by almost 15 years (the Egyptian Family Reform Law of 1929), and the divorce law in Egypt mentions only the absence of the husband and not the fear on the wife's part of hardship or unfaithfulness. All of these provisions added to the Hanafi law in force in the Sudan were of Maliki origin (Anderson, 1955: 314).

In another major Circular no. 28 (1927), the Sudan followed reforms which had been promulgated in Egypt prior to the date of its issuing. It is a heterogeneous circular and the topics addressed range from *nafaqa* to the marriage of a formerly enslaved woman to the recognized age of majority. Judicial divorce is granted to a woman whose husband is afflicted with an incurable disease or defect which makes married life intolerable. The nursing mother is entitled to support after divorce for up to two years and three months after the birth of the child, while the legal maximum for the non-nursing mother undergoing her 'idda period is set at one year for the receipt of support payments. *Nafaqa* payments are to be cancelled for the wife who is in a state of legal disobedience (*nushuz*), but the woman is entitled to support for the period during which she remained in her husband's house.

Sections 9 and 10 of the Circular recognize the absolute, free status of an emancipated slave, giving the woman all of the rights of a free woman and insisting that any contract of marriage between a woman and her former owner be scrutinized to insure that consent is freely given by the woman. This is the first statement in the twentieth century Shari'a regarding the legal condition of former slaves in which a directive is issued as to their proper legal treatment, and this is expanded upon in Circular no. 46 (1936).

The question of the age of majority is likewise answered in this circular and that age is specified to be 21 years, although the competence of an individual may be tested from 18 years of age.

Development of the Law regarding the Transfer of Property

As the Shari'a was undergoing novel interpretation regarding marriage and divorce, it was also being brought into alignment with new concerns regarding the transfer and inheritance of property, as capitalist economic principles were introduced throughout the colonial government. Land values increased, especially in the urban areas, petty entrepreneurship was developing along with a new class of bureaucrats and lower level government administrators. For certain segments of society wealth and cash flow increased and with this came the demand for clarification of the law regarding the transfer of valuables, movable and immovable wealth.

For example, Circular no. 12 (1912) mandates that land to be divided by heirs to an estate cannot be distributed unless that land is registered in the name of the testator; otherwise the court should conduct an investigation as to the lawful ownership of the land so as to avoid conflicts among the heirs. Circular no. 19 (1916) provides for *takharuj*, the selling of a share in inheritance to another heir or to a non-heir. Circular no. 21 (1916) describes the correct procedure for estimating the value of estates, mentioning specifically commercial enterprises, and Circular no. 22 (1916) informs the Shari'a judges that the division of estates involving the heirs to land and date palm trees shall be forwarded from the court to the appropriate registration office and that a piece of land smaller than 300 square meters will not be registered. Further Circular no. 25 (1923) puts forth rules regarding the partition of estates (*ifrazia*) when the item cannot be easily divided, for example a car or store. It calls for all of the heirs to be present in front of a Shari'a judge in court who will make a recommendation as to the division of the property, specifying the share of cash, and recommending a just partition agreeable to all. If some do not agree, another solution may be tried, but failing consensus among the heirs, the judge makes the final decision. New property relations create new social relations, and Circular no. 29 (1927) details the correct procedure to be followed for the use of a building or other property to be used as *mahr* payments. Permission to do so must be granted by a Shari'a judge and the marriage registrar, the *maa'zun*, should not accept immovable wealth, such as fruit-bearing trees or a building, as *mahr* unless there is documentation of this permission granted. The father of the bridegroom may transfer this wealth to his son through the use of the legal declaration of gift-giving called *hiba*.

Circular no. 26 (1925) breaks with the established opinion of all four schools of Islamic jurisprudence in that it entitles the spouse of the deceased, wife or husband, to the entirety of the estate if there are no other legal heirs. Normally the husband is entitled to half of the estate

of the wife and the wife to one quarter of the estate of the husband, the remainder going to the Public Treasury (*bayt al-mal*). This reform places the spouse relict on a par with the other sharers and this particular innovation was not introduced in Egypt until almost twenty years later in 1943 (Anderson, 1955: 314). The interpretation, no doubt, reflected both an appreciation of the bonds established through marriage and resulting mutual property relations and the desire to strengthen affinal ties over the traditionally favored consanguines. It may also have paralleled the growing prevalence of the nuclear family over extended family patterns which attended the growth of a budding capitalist economy in the first quarter-century of colonial rule, as this legal change emanated from and spread through the urban centers of the Sudan.

The regulations and governance of inherited and transferred wealth remained a continuing concern of the Shari'a courts as reflected in the directives issued from the office of the Grand Qadi.

Shari'a at the Height of the Colonial Period 1930–1956

As we move into the period that is within the memory of individuals today, the text of the Circulars can be supplemented with material taken from contemporary interviews.

The period of the 1920s was one of intense political activity around the question of Sudanese nationalism, reaching its peak in 1924 with the unsuccessful attack on British colonialism led by members of the 'White Flag' Society. Though the attempt failed, independence for the Sudan was placed on the historical agenda. Although the Circulars are not the best record of the upsurge of political activity during the early period of Sudanese nationalism, certain features of the times are evident in their directives. Circular no. 32, issued in 1931, is exclusively concerned with the supervision of the Imams of the mosques and reminds them that they are in the employ of the colonial government. It is well known that the Imams, who lead the Friday prayers, may also speak to the assembled worshippers of worldly matters, including politics. The masses might be exhorted to attend public demonstrations and section 11 of the Circular placed direct supervision over the mosque and speakers in the mosque with the Shari'a judge who 'should forbid them to misuse the floor for things not connected with religious guidance'. Administration of each mosque rested with a committee appointed by the Shari'a judge from prominent members of the community and the central administration which retained the right to dismiss any of the members. The central mosque administration was under the authority of the English Judicial Secretary who would consult with the Grand Qadi in the settlement of disputes over matters of mosque organization and

administration. A High Endowment Commission, for the supervision of the mosques and their personnel as well as the Islamic religious endowment called *waqf*, was constituted in this Circular of the Grand Qadi, the Mufti and Sheikh of the only Islamic religious school for advanced study at the time, *al-Mahad 'Ilmi*.

During this period the courts continued to refine and modify procedures to ensure the smooth functioning of the system. A new fee schedule is set in 1932 and changed in 1935 (Circular no. 33). There are detailed instructions in Circular no. 37 (1934) which provide guidance for the division of land for inheritance purposes where the parcel of land is less than the minimum size allowed by the Registration Office. The intention is to prevent the increasing sub-division of land parcels and the Circular insists that the co-heirs amalgamate their holdings, the smaller shareholders selling to the heir with a registerable piece of land and receiving just compensation for the sale. If the co-heirs cannot come to an agreement, then the court must make a judgment as to the consolidation of the land holdings among the heirs. Circular no. 39 (1935) directs that records of estates be kept longer than the 33 years provided for in the law, since questions in inheritance may carry over from one generation to another.

According to Circular no. 38 (1934) no Shari'a court in the Sudan shall accept a declaration of nationality (e.g. 'I am Syrian' or 'I am Egyptian') as proof of nationality and only government documents shall satisfactorily prove nationality.

Likewise, the continuation of the Anglo-Egyptian Condominium arrangement in this heyday of the colonial period created some ambiguity as to proper independence and autonomy of the courts in Egypt and the Sudan. The confusion was no doubt exacerbated by the large number of Egyptian military and bureaucratic officials present in the Sudan during the condominium. Circular no. 47 (1937) seeks to clarify that the Egyptian courts will not execute orders handed down by Sudanese courts which bear on persons resident in Egypt unless the decision is final and all persons and events connected with the case are in the Sudan. The Circular mentions that such suits are usually related to marital affairs, such as *nafaqa* and *mahr*, so it may be fair to conclude that official cooperation existed in these matters and there was an effort to control the irresponsible movement between the countries in order to escape one's duties.

Beyond this Circular no. 44 (1936) creates the First Class and Second Class courts and Circular no. 52 (n.d.) reorganizes their work geographically in the northern Sudan.

Inheritance and Wills

The trends already mentioned toward increased accumulation of wealth and a favoring of the nuclear family in certain matters of inheritance continued into this period as reflected in Circulars no. 30 (1928) and 53 (1945) which deal with the use of wills. Wills (*wasiya*) are customarily unnecessary in Islamic law because of the prescribed shares allocated to the Quranic heirs, and traditionally they were not a feature of Sudanese life until a class of relatively wealthy individuals developed. With this growing concentration of wealth came also the desire to make legitimate use of the Shari'a provision which permits the testator to bequeath up to one-third of his/her estate. However, Circular no. 53 goes beyond established thinking in Sunni Islam in that it allows a specific legacy up to the bequeathable third to an heir *or* non-heir, with or without the consent of the other heirs. Prior to this such testamentary bequests to particular heirs were interpreted as favoritism. The view enunciated in this Circular is closer to the Shi'a view than to any of the Sunni schools of law and only the Sudan and later Egypt, in 1946 with the Law of Testamentary Dispositions, and Iraq in 1959, have adopted this position regarding wills (Anderson, 1955: 319; Coulson, 1971: 255). The Circular does admit the preference for agreement to the will by the heirs and states that the will 'will not be executed in the courts unless confirmed by the other heirs'. At a later date the law regarding *waqf* (religious endowment) as a special form of bequest in Islam was reformed to prevent its use for disinheriting or favoring certain heirs.

Several reforms modifying existing Hanafi law on the subject of inheritance were promulgated during this period. Circular no. 49 (1939) equalizes the shares of full or half brothers and sisters of consanguine and uterine lines and Circular no. 51 (1943) puts the grandfather on a par with the full brothers, so that he does not inherit in their stead as Hanafi law provides. These two will be explained more fully in the chapter on inheritance, but it is enough to say here that they represent a substitution of Maliki and Shafi'i interpretations and also antedate similar reforms in Egypt by several years. The moves to abrogate the position of the grandfather in inheritance and to strengthen the status of full or half sisters and brothers can be seen as a further indication of the growing strength of the nuclear family and a related trend toward some modification of the favored status of the male agnates (*al-'asabah*).

Child Custody, Divorce Reform, Guardianship in Marriage, Extinction of all Vestiges of Slavery

A number of important and far-reaching statements of law regarding personal relations were instituted through the special mechanism of the Judicial Circular during the period prior to the Second World War and

before the great push for the national independence of the Sudan. The period between 1932 and 1936 was an extremely active one and major pronouncements regarding child custody, marriage, divorce and the legal protection of former slaves were made from the Shari'a department of the Sudan Judiciary. Presumably these changes were preceded by much discussion among the Shari'a judges of the High Court and the learned 'ulama, as is the case today, and once again certain of these new provisions reflected developments under consideration or in effect in the courts in Egypt.

In the case of Circular no. 34 (1932) regarding *al-hadana* or the custody and care of children, the law in the Sudan goes far beyond what was instituted in Egypt in 1929 permitting the mother to retain custody of a son up to the age of seven years and a daughter up to the age of nine years, as the Hanafi law provides. The Circular adopts the Maliki view that a mother may retain custody of her son until the age of puberty and of her daughter until the consummation of her marriage if good cause is shown that this is in the interest of the children. In stating its preference for the Maliki position in child custody the courts are underscoring Maliki traditions in the Sudan and have adopted the most liberal view regarding women and the custody of their children in Sunni Islam. Only in 1979 was Egyptian law modified on this point to conform with the 1932 law in the Sudan.

On the question of guardianship in marriage (*al-wilaya fi zawaʿj*) in the interest of the preservation of Maliki traditions, the relatively more liberal provisions regarding female consent in marriage in Hanafi law were struck down in Circular no. 35 (1933). Instead, a valid marriage in Sudan could only be contracted by the bride's guardian, usually the woman's father or his agent. The marriage guardian could contract a marriage for the virgin up to 33 years of age without her consent. The leading expert in Islamic law in Africa, J.N.D. Anderson, who has abstracted many of the Circulars, says this may well be regarded as the solitary instance in which these Judicial Circulars have been used for a purpose more retrogressive than liberal (1955:315). Indeed the reaction to the harshness of taking away all consent in marriage from women, while not felt instantaneously, built up over a period of years and became an issue among leading women's groups until its eventual reform in 1960. The call for modification of the law regarding women's consent in marriage was part of a developing view of the status of women with a growing sense of their competence and equality before the law. The response to the call would not come for another generation.

Judicial Circular no. 41 issued in 1935 followed developments taking place in Egypt and in other parts of the Islamic world with respect to interpretation of the unilateral right of the husband to divorce. The

unfettered triple pronouncement, '*talaq talata*' ('I divorce you three times'), which could be uttered in the presence of the required two witnesses and which would result in the immediate repudiation of the wife, came under certain restrictions. A divorce uttered in a state of intoxication, anger or spoken as an oath or threat is nullified by these contexts. In place of the triple *talaq* uttered on a single occasion, the pronouncement of divorce must be made on three separate occasions with a clearly stated intention to divorce. Likewise a husband who sets impossible conditions for the wife and then divorces her for failure to meet them has conducted an illicit form of divorce. All divorces should be revocable, except for the final divorce uttered on the third occasion.

Circular no. 46 (1936) repeals an earlier Circular no. 2 and makes a definitive statement regarding the legal status of women who were formerly slaves. Slavery was officially abolished in the Sudan in 1900, but its practice on a small-scale, household level continued for some time after this. The final denial of the recognition of slave status in any form in the Shari'a in Sudan is outlined in this Circular. Slavery was known in the Hejaz before Islam and the law as it developed in the centuries after the advent of Islam acknowledged slave status as inferior yet possessing certain rights in the law, among them the ability to inherit from the slave's owner. All vestiges of the system of slavery (*al-'abudiya*) in the law of personal relations are eradicated in this Circular. Thus, for instance, no contract of marriage between a previously enslaved woman and her former owner shall be confirmed unless proof of the woman's consent is shown. Civil courts will handle any matter of inheritance between a former slave and owner as well as any question of the legal status of a former slave, while the Shari'a court has jurisdiction in all other matters regarding the personal relations of freed individuals.

From Independence in 1956 to 1979

Sudan was among the first African nations to attain its independence in 1956 and it embarked on a program of Sudanization in all areas of government, including the Judiciary and its Shari'a section. The first Sudanese Grand Qadi after independence, Sheikh Mohammed Abul Gassim, was appointed by the independent government and Sudanese nationals replaced Egyptians and other expatriates in the court system. The last Grand Qadi before independence, Sheikh Hassan Muddathir, as one of his final acts issued an appeal for an Islamic constitution basing his appeal on the judgment that 'the Sudan is an Islamic country; its social organization is built on Arab customs and Islamic ways' (1956: 1). In 1955, fighting in the southern Sudan had broken out which would

lead to a protracted civil war of 17 years duration over the issue of southern representation in the majority Muslim government dominated by northerners. The issue of an Islamic Republic has continued to be controversial to the present day opposed by minority religious and ethnic groups. This will be treated as a separate topic in the last chapter.

Circulars 54 through 62 were issued during this period; four of these deal with the subject of *waqf* or religious endowment, and in the main they modify existing law to conform with modern economic realities. A *waqf* is a specialized concept in Islamic law which allows a donor to make a charitable bequest to relations (*waqf al-ahli*), or to a public concern, a hospital, the poor or a mosque, for example (*waqf al-khayira*).

Circular no. 56 adopts the Maliki position regarding the admissibility of movable wealth as part of *waqf*, contrary to the Hanafi view which does not allow movable property to be considered in *waqf*. Specifically mentioned here as movable wealth are inherited shares from a private business as distinguished from buildings or other immovables normally named as part of a religious bequest.

Normally *awqaf* (plural of *waqf*) are intended to be held in perpetuity, and according to Shafi'i and Maliki schools the donor has no right to withdraw the *waqf* once made and ownership of the endowed property is transferred immediately to the beneficiaries. Hanafi law, on the other hand, permits withdrawal, revocation or amendment of the *waqf* by the donor and even extends this right to the beneficiaries. Circular no. 57 (1970) recognizes the Hanafi rules and excepts the more widely held view of the other schools in Sunni Islam. This Circular has come under study by a delegation of Islamic scholars from Northern Nigeria for possible adoption of a similar view in the Shari'a there which is strictly Maliki in orientation.

Circular no. 58 (1970) represents a major reform in the rules as applied to *waqf* in the Sudan and was promulgated as part of a larger move for reform in the Islamic world to prevent the potential abuse of the family *waqf* (*al-ahli*). Egypt, for example, has abolished all family or 'native' *waqfs*. This topic will be dealt with in greater detail in the chapter on inheritance and *waqf*, but it is enough to say here that the intention of this circular was to effectively block the use of family *waqf* for the purpose of favoring one heir over another or for disinheritance of certain heirs or certain classes of Quranic heirs. The need to check this potential abuse is another indication of the direction of change in Sudanese society, toward an increasing concentration of wealth combined with a tendency not to distribute it along traditional lines in the extended family.

A number of important developments in the law, reflecting basic change, occur during this period after independence. With mounting pressure from the Sudanese Women's Union and growing public

sentiment against compulsory marriage (as mandated in Circular no. 35), the Grand Qadi in 1960, Sheikh Mahjoub Osman, reinstituted the Hanafi legal principle that the consent of the bride-to-be is at all times an essential feature of the marriage contract; moreover the consent must be expressly stated. The role of the marriage guardian is still kept in place, and the apparent intent of this Circular was to give the right to refuse the marriage, but not the right of full, free choice (Farran, 1963: 39).

Discussion of this question continued into the more recent period with legislation passed in 1972 which clarified further the concept of consent. That legislation explained that consent may either be expressly given or implied, for example the fact of cohabitation or the birth of a child would imply consent to the union.

A further progressive step was taken in the full recognition of the Maliki ground for divorce because of cruelty (*talaq al-darar*) in Circular no. 59 issued in 1973. The Grand Qadi, Sheikh Mohammed al-Gizouli with whom I studied the Shari'a, noted that cases involving divorce because of harm are increasing and the interpretation of the previous Circular (no. 17, section 14) has become difficult because proof of cruelty is only to be determined by two male witnesses. It is recognized that this may be insufficient and other sources, including testimony from the wife, may be admitted. Moreover cruelty is acknowledged to be both physical and mental and may also be established in court with testimony from witnesses, a confession, or official papers from the criminal courts indicating that the husband has been prosecuted for assault against his wife.

With the increase in cases claiming *darar* as a ground for judicial divorce has been the concomitant rise in cases which combine aspects of cruelty with disobedience on the part of the wife. Circular no. 61 seeks a solution for the woman who wants a divorce and is suffering under alleged cruelty where she has left the conjugal home and therefore is legally disobedient and is not entitled to support. The technicalities of this legal conundrum are outlined by Sheikh al-Gizouli and these will be considered in greater detail in the chapter on divorce, but the simple solution provided for in this Circular is for the wife to seek a release from the marriage by offering some money or property (*fidya*) in exchange for her husband's divorcing her. Thus another judicial mechanism for divorce by the wife is provided and effectively the husband's unilateral right of divorce is further curtailed, continuing a major trend in the development of the Shari'a in the Sudan in the twentieth century.

In a similar vein with an eye to the complexity of the social problems seen by the Shari'a courts, Circular no. 62 speaks to the real problem

of the maintenance of minor children who are the subjects in a child custody case, where such cases may take a year or longer to resolve. The Circular orders judges in these cases to assess the situation and to issue a maintenance order for the child (children) at the outset of these long and difficult cases. Circular no.62 was the last one to be issued under the system where the Shari'a maintained its autonomy and independent structure with a Grand Qadi at the head of the system. This Circular was issued in October 1979, just prior to the retirement of Sheikh Al-Gizouli; I happened to have a lesson with him that day and this provided an opportunity to discuss the genesis of a Circular. A Circular may be proposed by a member of the Shari'a High Court and once it is drafted it is then circulated among the High Court judges for their consideration until a consensus regarding the contents is achieved. Then the Circular is issued from the office of the Grand Qadi and it is sent out to all of the judges for application in the courts from the date of its issue.

The period 1973–1979, under the influence of Sheikh Mohammed Al-Gizouli, represents one of the more enlightened periods in the modern history of the Shari'a in Sudan. It was during this period that four women justices were appointed in the Shari'a court system, the first of whom was Justice Najua Kemal Farid who was to my knowledge the first Islamic woman judge in Africa in the modern period. She was appointed in 1970 and the others were appointed in 1973 and 1974.

In the early days of the military rule of Jaafar Mohammed Numieri, 1969–1971, while the regime was basically reformist in character, a number of changes were legislated which had a direct bearing on the Shari'a. A number of reforms affecting the status of women were introduced, among them equal pay for equal work, improved maternity leave benefits and a controversial move which allowed *nafaqa*, maintenance, payments up to half of a man's salary to support a wife so entitled. In practice this latter reform appears not to have a major impact on the courts.

However another reform did, that altering the basic character of *bayt eta'a*, obedience to the house. Before the intervention of the Numieri regime, husbands had the ability to have their wives, who had fled the conjugal home, returned to them by force using the police so ordered by a Shari'a court. With the reform the element of police force, the 'teeth' in the law was removed, and this was the first time, since independence, that the government had intervened and altered the work of the Shari'a courts. There was some confusion and resistance among the Shari'a legal personnel initially but this gave way to acceptance and enforcement of the reform eventually. The abolition of *bayt eta'a* was popularly received by Sudanese women and the Women's Union

responded through public demonstrations in support of the change (Fluehr-Lobban, 1977: 140). The same Women's Union was abolished by the Numieri regime because of its continued agitation for women's issues in the face of an increasingly conservative military rule after 1971.

In 1979–1980, a reorganization of the Judiciary was proposed, a restructuring that would unify the Civil and Shari'a sections of the Ministry. After the retirement of Sheikh Al-Gizouli no new Grand Qadi was named and the position of the Mufti was transferred to that of Counsellor attached to the Attorney General's Office. The Civil and Shari'a sections of the Judiciary were united under the Chief Justice (from the Civil section) who has four Deputy Chief Justices, one of whom is from the Shari'a and three from the Civil system. The Shari'a High Court has been disbanded and the Supreme Court of the Judiciary is to specialize only in questions of jurisdiction and constitutional issues and will not hear cases on appeal. As part of a move by the Numieri regime in recent years to decentralize the administration of government in the regions, each region was to have its own independent system of appeals courts. In September 1983 President Numieri announced in a Presidential Proclamation that henceforward the only state law to be in force would be the Shari'a, and implementation of his decree began almost immediately. Public criticism, primarily from dominantly non-Muslim segments of the Sudanese population was equally swift.

I should add that all of these changes are occurring within a highly politicized atmosphere involving questions of an Islamic state on the national level and localized political autonomy, and there is no unanimity of opinion, either in the public domain or within the legal profession, regarding the wisdom of such sweeping change. Both Shari'a and Civil judges are complaining of their inability to apply the law in which they have neither sufficient training nor experience.

NOTES

1. This section is based on the excellent study by 'Umar al-Naqar entitled *The Pilgrimage Tradition in West Africa*, Univ. of Khartoum Press, 1972.
2. The author is honored to carry the Sudanese name of Mihera bint 'Abboud, a Shaygiya young woman who led her people into battle against the invading Turco-Egyptian army riding on a camel and making the ululating cry, the *zagharat*.
3. See Appendix II for a list of the Circulars and their contents.

CHAPTER THREE

STRUCTURE AND PROCEDURES OF THE ISLAMIC COURTS

The modern Shari'a court system was established as one of the first major acts of the Condominium government. The British constructed the system upon the institutions and principles which had been utilized by the Ottoman Turks in the Sudan before the Mahdiya and with which the English were already familiar. In the Sudan the English made it a policy to recognize the Shari'a as an independent and autonomous system of law unlike other colonized regions where the Shari'a was viewed on a par with other varieties of customary law (Anderson, 1969: 44). The granting of a separate status to Islamic law from the English-based Civil law was no doubt a gesture of appeasement to the Muslim community so devastated by the reconquest and crushing of the Mahdiya. The other side of the issue is that, having once been defeated by the Ansar as the Mahdi rose to power, the British had little interest in pursuing any policy which might be construed as anti-Islamic and a further source of agitation.

The jurisdiction allotted to the Shari'a or 'Mohammedan' courts was prescribed and limited to a law of personal status regulating affairs between Muslims, as it had been during the Turkish occupation. This, of course, represented a significant break with practice during the Mahdiya when the Shari'a was the sole law in force encompassing civil, criminal and personal status law.

As mentioned in the preceding chapter, the Shari'a courts were established by the Mohammedan Law Courts Ordinance of 1902 and the Mohammedan Law Courts Procedures of 1915, subject to the authority of the English offices of Governor-General and Legal Secretary. In 1936 a system of First Class and Second Class judges was created revising the system where Province courts had been presided over by the First Class judges.

The Shari'a courts were constituted as follows:

- (1) A High Court consisting of the Grand Qadi, the Mufti and other High Court judges – a quorum is three
- (2) The Court of Appeals
- (3) The Province courts located in the capital cities of the various provinces¹
- (4) First Class courts
- (5) Second Class courts

The First and Second Class courts exercise original jurisdiction. Only the Province courts have both original and appellate jurisdiction.

The High Court and Court of Appeals are located in the Sudan Judiciary in Khartoum. There are Province courts in each of the three towns (two in Omdurman, two in Khartoum North and three in Khartoum) due to the volume of cases in Sudan's major urban area. At the Khartoum Shari'a court, for example, there are nine judges presiding including the Province judge, Appeals judges and First and Second Class judges. Provincial courts are also located in the major towns of Wad Medani, Kassala, Port Sudan, Gedaref, Al-Obeid, making twelve Province courts in the whole Shari'a system. First and Second Class courts are more localized and are found in the smaller towns alone or with the Province courts in the towns already mentioned. Muslims residing in the southern region are served by these courts in the towns of Malakal, Wau and Juba.

Inspection, Supervision

A Committee of Supervision composed of the Chief Justice (of the entire Judiciary), the Grand Qadi, the Mufti and the Inspector of the Shari'a courts supervises the work of all of the courts, except the High Court.

Court of Jurisdiction

The Judiciary Act of 1959 provides for a Court of Jurisdiction to decide the appropriate jurisdiction of any conflict which might arise between the Civil and Shari'a Divisions. The special Court of Jurisdiction is composed of the Chief Justice (as president), the Grand Qadi, two judges from the Civil High Court and one from the Shari'a High Court.

Since its creation, no one can recall that the court has ever had to decide the competent jurisdiction.

Recognition of other Shari'a Courts

The Shari'a courts in the Sudan early in its history in the twentieth century had to deal with the question of the appropriate court for Egyptians resident in the Sudan and for Sudanese nationals residing in Egypt (Circulars no. 8 (1908), no. 15 (1914)). Circular no. 23 (1918) recognizes decrees issued by the Shari'a courts in the Hejaz (later Saudi Arabia) as long as these orders are accepted by the British authorities. Circular no. 9 (as amended in 1929) recognizes documents from Shari'a courts in Eritrea provided that the documents are sealed and approved by the Eritrean judge and endorsed by the Judicial Secretary of the Sudan. Documents sent from the Shari'a courts in the Sudan should be transmitted through the office of the Legal Secretary in the Judiciary. This was colonial policy.

Today the Shari'a courts recognize the legal documents of Shari'a courts in all other Islamic countries provided that the decrees (*'ilamat*) are verified by the Sudan Embassy in that country and by the Ministry of the Interior in Khartoum. Essentially the documents are validated by coming through the proper channels, according to Sheikh al-Gizouli.

SHARI'A COURT PROCEDURE

There is much in the Shari'a law of evidence and procedures which is similar to Western law, but there are a number of features which have no parallel in the West. Much of this rests with the essential lack of an adversarial system in the Shari'a and much in the area of procedure is predicated on the plaintiff and defendant representing him/herself.

The procedure whereby a suit is filed is simple and straightforward. The person initiating the complaint sets out the grievance and the desired legal effect in a petition which is drawn up at the first appearance in court whereupon a date is set for the first hearing of the case. On that date both plaintiff and defendant must appear in court with their witnesses, and all should be prepared to state the essential facts of the case, essentially the charges and counter-charges, the arguments and counterarguments. For the most part the judge, who sits alone, directs the case, questioning the plaintiff and respondent and their witnesses. Representation by advocates is not necessary and lawyers are only employed by those who can afford them and where the case is complex and protracted, or where large sums of money are involved, such as inheritance cases.

The witnesses are sworn to tell the truth by taking an oath on the Qur'an, the penalty for perjury being up to seven years' imprisonment under the Sudan Penal Code. The judge then questions them as to the

facts in the case as they understand them and how they came to know them. They are also questioned as to their relationship to the parties in the case. Husbands and wives, parents and children are barred from testifying against each other excepting the cases where these relations are involved in the same suit as plaintiff and defendant. Not every potential witness is acceptable – a qualified witness is one who (1) can derive no benefit from his/her testimony and (2) has no proven history of enmity with the defendant. Generally it is expected that witnesses favorable to one case will come from that person's extended family.

In any suit, the burden of proof is on the petitioner who is raising the claim against the defendant – respondent. The weight of the law is behind the defendant until the evidence mounts against him or her; it is essentially a version of 'innocent until proven guilty'. Any real doubt in a case or failure to prove a claim falls to the benefit of the defendant, similar to the 'proof beyond a reasonable doubt' which operates in Western criminal law (Circular no.60, 1973).

The rights of the defendant to respond fully to the charges alleged in the case are guaranteed. And, in the absence of representation by an advocate, the judge should advise the respondent of these rights. The defendant has the right to challenge the lodging of the suit on the grounds that the court has no jurisdiction in the matter, that the same action is pending before another court, or that he/she is not a proper party to the action (Mohammedan Law Courts Procedure, 1915, section 98).

The defendant must answer directly and specifically to all of the charges alleged in the case and he/she must explicitly state whether the allegations are admitted or denied. If the defendant refuses to answer a charge, then this is presumed denial (ibid, section 101). The witnesses against the defendant are heard separately by the judge, and the defendant has the right to ask any question of the witness through the Qadi as interrogator (ibid, section 145).

Witnesses

Evidence in a case is built almost entirely through oath-taking and the testimony of witnesses, and a statement is not confirmed as truthful until it has been corroborated by at least one other full witness, i.e. one man or two women. The idea is to have two full witnesses to an event or statement, that is two adult, upright Muslim males. Failing this, the testimony of one man and two women is acceptable, while having only women as witnesses is considered unreliable and unworthy evidence. A potential conflict of laws between Civil and Shari'a procedure has

been raised in so far as the primacy of oath-taking is not sufficient to establish proof in Civil law, as it is in the Shari'a: the rules regulating female witnesses are a contradiction of the Sudanese constitution which guarantees equality irrespective of sex (Vasdev, 1981: 50). I pursued this point with my learned colleagues in the Shari'a, both women and men, as to the social and philosophical reasons for the testimony of a woman to be half that of a man. First of all, it is consistent with the Shari'a on other matters, especially inheritance where the share of a woman is half that of a man and the traditional blood compensation (*dia*) for a woman is half that of a man. But the more compelling arguments are social in that women are not accustomed to be observers of events outside the restricted domain of their households. Secondly it is shameful in any event to come to court, but to testify and be cross-examined on subjects which may be quite sensitive is considered undignified for women and is to be avoided. Ironically, a woman may be less hesitant to raise a suit than to act as a witness (and the statistics of court cases bear this out) since as a plaintiff she is never cross-examined and the truth of her allegations is only ascertained by *her* witnesses. As a result, women are far more likely to have their male relations act as witnesses in cases in which they are involved as petitioners.

The matter of two women having the weight of one male as witnesses is generally not an issue with women and concerns with other rights in the law are much more fundamental. The right of a woman to own and dispose of her own property is much more basic and would result in more of an outcry were there a move to abrogate these rights. The following transaction which I observed in the law offices of one of Khartoum's attorneys illustrates this point:

A Saudi woman married to a Sudanese has come with two women friends and the Sudanese woman from whom she is purchasing a plot of land for £S 2000 for the purpose of her own investment. The buyer and seller have brought two men from the *suq* outside of the office and asked that they act as witnesses. The papers of sale were drawn up by the lawyer and signed by the seller, buyer and the two male witnesses. The down payment of £S 500 was made on this date with the remainder to be paid three months from the date of sale.

(Observed 30 December 1979 in the law offices of Jelal Eddin Mohammed Saeed)

As might be sensed from this description, the witnesses were almost incidental to the transaction carried out between these women and the fact that they asked two strangers, their only qualifications being

that they are adult Muslim and male, suggests that the witnesses were not a primary consideration.

The only exceptions to this general rule of the two full witnesses are situations where only one witness or women can testify as to the events, for example the midwife who attended the birth of a child. Also, in the Sudan, where Maliki law is followed regarding the possibility of divorce because of a physical defect in the woman (cf. section on *talaq al-‘ayb*), proof of the physical defect is established only with women witnesses.

In the pure Islamic law adultery is a criminal offense which, if proven, is punishable by death of the adulterers by stoning. In the Sudan, as elsewhere except Saudi Arabia and Pakistan, adultery is a matter for the civil courts and is outside the jurisdiction of the Shari‘a. However, the point is worth making with respect to witnesses and oath-taking that the only sure proof of adultery is by the testimony of four full witnesses. Since the latter is considered nearly impossible, i.e. to have four witnesses to an adulterous act, the interpreters of the law meant, it is thought, for adultery to be extremely difficult to prove.

Oath-taking

Litigants in a case and their witnesses are not routinely ‘sworn in’ before they have their say in court. The general rule is that anything which cannot be known except as related by the person him- or herself is a matter which should be subjected to oath-taking. A woman takes an oath that she is pregnant, or that she has or has not passed her three months *‘idda* waiting period. Likewise only the woman herself can swear to the state recognized as a ground for divorce, *khof al-fitna*, ‘fear of temptation’, after more than a year’s separation from her husband. A woman from outside of the Sudan, for instance, says she is Nigerian and is married to a Nigerian who is in that country; if she is claiming divorce because of lack of support, perhaps only *she* can swear to the fact that he is in Nigeria and he is not supporting her for it is likely that she will not have witnesses in the Sudan from her family. She can be granted the divorce in the Sudan Shari‘a courts on the strength of her oath since she is not of the local community and lacks the support of relations to establish her claim. If the husband appears and denies the veracity of the ground for divorce, the divorce still stands until the husband proves otherwise (Circular no. 17, ca. 1915).

A menstruating woman is in a state of impurity (*mudaat al-‘ada*) and is therefore not allowed to take an oath on the Qur’an and appear as a witness. A woman who has come to court to testify may be asked by the Judge, ‘inti fi mudaat al-tahara?’ ‘Are you in a period of purity?’ and before taking the oath she will use the colloquial form of swearing

to the truth, 'Iwah, Wilahi', 'Yes, By God'. There is no comparable period of impurity for a man with respect to oath-taking.

The formula for taking the oath on the Qur'an is similar to its counterpart in the West. The witness places his/her right hand on the Qur'an and repeats after the judge, 'Wilahi 'azim, agul al-haqq, wa cul al-haqq' – 'I swear by God to say the truth and all the truth'. Perjury, according to the judges, is quite rare.

Initiating a Case

If a person feels that she or he has been victimized by some violation of the Shari'a law, they may seek the advice of a lawyer or go to the court and review the details with one of the Shari'a court clerks or legal assistants. Traditionally public knowledge and understanding of the Shari'a came from consultation with the Imam of the mosque, one of the learned holy men or simply advice from family and friends. The specialized function of the Mufti in Muslim states was and remains to be a source of legal information and advice. In the contemporary urban areas of the Sudan, there are discussions of the law, its traditional interpretation and recent development, on radio and television. A popular radio program which is on for 10–15 minutes on Fridays (the religious and social equivalent of Sunday in the Western world) hosted by a prominent Shari'a lawyer, Gamal Shantir, and one of the High Court judges, Sheikh al-Siddiq Abdel Hai, answers the questions of listeners regarding Shari'a law, the courts and procedures, how to initiate a case and the cost of the legal fees. Such programs are of great educational value and probably help to destigmatize the use of the courts, although no serious investigation of the role of the mass media in Sudanese life has yet been undertaken.

The person wishing to begin a case details the events and the clerk or legal assistant determines whether there are legitimate grounds for the suit or not. The applicant then pays the clerk 10 piastres to write a summary of the case which then becomes the basic document for the litigation of the suit. The petitioner then pays the courts' fees for initiating the suit and a date is set for the first hearing of the case. The applicant is told to bring witnesses on the date of the first session, and if there is an unwilling witness the petitioner pays a small fee for a summons to be issued to bring this witness to court.

Any decision with which a plaintiff is dissatisfied is appealable at the court one stage higher. Appeals from Second Class courts are heard in front of First Class or Province courts; appeals from First Class courts are heard before Province courts and appeals from Province courts are heard by the Court of Appeals and the last court of appeal is the Shari'a High Court. A plaintiff and his/her advocate has 15 days to bring appeals before First Class, Province and Appeals courts, while one month is allowed for appeals to be brought before the High Court.

The statute of limitations for all Shari'a cases is one year and if 15 years or more have passed a case cannot be adjudicated at all.

Court Fees

The cost of litigation represents no barrier to bringing a case before the court. Even if the minimal fees cannot be paid, customary practice allows the applicant to draw up a petition to be heard before the court. The following fee schedule is currently in effect in the Sudan.

Types of Case	Amount
Nafaqa	25 pts.
Talaq	25 pts.
Hadana	25 pts.
Mahr	1% or 5% of the dower
Hiba	10% of the amount of the gift
Estates	
up to total value of £S200.00	1% of its total value
£S200.00–£S1000	2% of its total value
greater than £S1000	3% of its total value

Cases heard on appeal carry a fee of 50 piastres. If the case is one of dower, *hiba* (gift) or an estate, the appeals court takes 25 per cent of the original court fee. For cases appealed to the Shari'a High Court, the amount of the fee is the same.

Lawyers' Fees

Some lawyers in the Sudan practice both in the Civil and Shari'a divisions but others specialize only in Shari'a cases. Lawyers are typically trained at the University of Khartoum Law Faculty or at the Khartoum branch

of Cairo University, and more recently at Omdurman Islamic University. They complete four years of study and must pass a bar examination before being admitted to practice.

Lawyers maintain professional offices and may conduct simple legal affairs, such as the documentation of a sale of property or the verification of a contract of marriage, in their offices.

Lawyers are not required to litigate a case and for the most part they operate in the major urban areas where their professional services are in demand. Those who can afford to pay the lawyers' fees will engage their services particularly in cases involving larger sums of money, such as inheritance or *nafaa* cases. For particular types of cases there are no fixed terms of payment and this is open to negotiation between the lawyer and client. With the escalating costs of every commodity and service in the Sudan, lawyers' fees have also been affected and it is not uncommon to hear of a professional fee of £S1000 paid to an advocate for a successful inheritance case or a specialized legal matter involving marriage, divorce or child custody.

It is advisable that the negotiations be formalized in a contract which is binding on both parties, but if there is no contract and a disagreement as to fees either party may sue the other to clarify the issue of payment.

A number of cases involving advocates' fees have come before the courts precisely because there is a certain informality which obtains between lawyer and client where the payment of fees is not explicitly negotiated. One such case was heard on appeal before the Shari'a High Court and involves the relatively larger sums which lawyers anticipate in major inheritance cases.

The appellant appeared before Omdurman Province Court demanding lawyer's fees be paid to him in the amount of £S3000 for his handling of an estate and the dissolution of a business partnership. The heirs, against whom the appeal is lodged, claim that they never agreed to any sum with him, but with another attorney who subsequently recommended the appellant to them. The lawyer says he sold some land on their behalf and deposited the sale amount in the bank, acting as their agent. He requested two impartial lawyers to come to court and testify as to the fees to which he is fairly entitled. One advocate testified at £S800 and the other at £S650, and upon hearing this testimony the court ordered payment of £S600 advocate costs of the appellant.

This decision was appealed by the widow in the estate case on behalf of herself and as legal guardian to the minor heirs. She claimed that the attorney never completed the work on the estate

and that the appellant was not, therefore, entitled to the full fees as assessed by the courts. The work was left unfinished because the appellant was licensed to practice only in the Shari'a courts and the dissolution of the business partnership involved work in the civil courts.

The appellant responded that in any event he had been involved in 13 sittings over this case and was entitled to fees for his work.

The High Court in its decision pointed out that the order of the court with respect to advocate's fees has the force of a decree, but that it is not final and can be appealed. Since no written agreement as to fees negotiated existed, the testimony of expert witnesses was admitted, however the appellant was entitled to be paid only for what he actually executed. 13 sittings had been established and in the opinion of the court the appellant-lawyer was entitled to these fees which it assessed at £S300.

(Cassation 130/1974 heard before Shari'a High Court. Judges presiding, Sh. Magzoub Kamel Al-Din Abbas (Pres.), Sh. Ahmed Mohammed Abul Gassim, Sh. Salih Ahmed Abbas).

The increase in such cases has had the effect of introducing greater formality into the relationship between attorney and client, which had been characterized by a certain informality.

THE SHARI'A JUDGES

The Shari'a judge (*al-qadi*) is a respected member of the Muslim community, whose status increases generally with advanced education, years of experience in the court system and a reputation for fair as well as learned judgments in the law. The term of respect 'Moalana', 'the enlightened', is used for all judges including Shari'a judges. Until 1970 all of the judges in the Islamic court system were men but in that year the first woman justice in the Shari'a system was appointed by Sheikh Mohammed al-Gizouli. The appointee was Najua Kemal Farid, who became my friend and who has assisted me with many research projects over the years. After her appointment three others were made in 1974-1975, namely Justices Amal Mohammed Hassan, Rabab Mohammed Mustafa Abu Gusaysa and Fatma Mekki Al-Sayed Ali. All were appointed by Sheikh Mohammed al-Gizouli and the appointments came at a time when the Shari'a jurists were taking a more liberal attitude toward the status of women in marriage and divorce and the rights of working women. A good measure of this liberalization is

traceable to pressures for reform stemming from the progressive forces that brought Jaafar Numieri to power in the 'May Revolution'. The work of the women justices will be considered later in the section.

All judges must be trained in the law and must pass examinations which test their ability in the law. During colonial times it was not uncommon for Sudanese jurists to be trained at al-Azhar University in Cairo or at the only institute for training in Islamic studies at the time, Al-Mahad 'Almi, in Omdurman. When Gordon Memorial College became the University of Khartoum after Sudanese independence, the study of the Shari'a, as part of training in the law, came into its own. Shari'a courses were required for all law students in the Faculty of Law, University of Khartoum, and a special Bachelor of Laws in the Shari'a was offered as a four year course. Justice Najua Farid was the first woman to complete this course in 1970.

Today training in the Shari'a is shifting away from the University of Khartoum to the growing Omdurman Islamic University which has greatly expanded from the times when it was the 'Al-Mahad 'Almi'. The Islamic University is largely funded with Saudi assistance and is developing into a regional center for the study of Islamic subjects including the Shari'a. Shari'a is still a required course of study for all law students at the University of Khartoum, but it is less a center for training lawyers and judges in Islamic law than it has been for the last 25 years. Shari'a lawyers, especially, but some judges as well may receive their training at the Khartoum Branch of Cairo University.

Graduates of approved courses with a specialization in the Shari'a must sit for an exam which covers points in the law regarding *al-fiqh* (understanding or general knowledge of the law), procedure, evidence and the complex law of succession. Passing the exam is necessary in order to be appointed judge to a court. On the basis of the results from the pool of candidates taking the exam in a given year, a priority list is prepared of those who will be interviewed and selected as suitable trainees for a position in court. Those who are selected must take an additional practical training course for four to six months, after which they are assigned to a court as legal assistants and work with an experienced judge for one to two years, after which time they are finally ready for their own court position. The first appointment is at the level of Second Class judge; from there to First Class judge, Province judge, Appeals Court judge and High Court judge.

The jurisdiction and work of the judges at the various levels of the system is as follows:

1. Judge of the Second Class
2. Judge of the First Class
(Both District Judges; jurisdiction includes cases which involve sums of money up to £S2000.00.)
3. Province judge – has original and appellate jurisdiction, so the Province judge can hear the same cases as are seen before First and Second Class judges as well as appeals cases from these courts. Cases involving large parcels of land or sums exceeding £S2000.00 are heard by the Province judge. There are 12 Province judges.
4. Appeals Court judges – are located at the Shari'a section of the Judiciary and only hear appeals cases from the Province court.
5. High Court judges – usually five to seven in number, including the Grand Qadi and the Mufti and hearing only appeals cases from the Appellate Court.

There is no judicial review of the decisions of the lower courts and any problems of interpretation only come to light by way of appeal. There are about 250 judges in the entire Shari'a system in the Sudan all of whom are involved in decision-making in some capacity at some level of the system. The four women judges do not work openly in court, but are assigned to the High Court of the Shari'a section of the Judiciary. The question of women judges appearing before the public has been a matter of some controversy and open debate. Although women judges have sat in Magistrates' courts in the civil system in the Sudan since the early 1960s,² it is still felt that having women judges in public courts is inappropriate social practice. Some say the people will not accept decisions from them, although this has not been a problem in the civil courts, while others claim it is a violation of the modesty and dignity of Muslim women to have them deal with the harshness of people's problems in an important symbol of Islam in practice, the Shari'a court. I personally know most of the dozen or so women judges and they themselves are divided over the question, with some realizing the important symbolic victory having a woman in court would mean, while others prefer the quiet, protected working environment of the offices in the Judiciary. I should add that male judges who have worked in the courts have also expressed the same preference for the office work. In sum, women judges have not come into the courts because the 'ulama are divided on the question; the fact is, there is a lack of public consensus and the women judges are not seeking this change.

It is far less controversial for women to pursue the legal profession and members of the 'ulama have officially encouraged women to become lawyers. Sheikh Siddig Mohammed Abdel Hai, one of the Shari'a High Court judges, has said:

Personally I favor women becoming lawyers especially for dealing with family problems because a woman lawyer can better learn all of the facts in a sensitive case involving a woman as client whereas a male lawyer might find his female client concealing information which in turn could affect the decision of the court. Unfortunately we have very few female lawyers for these types of cases (interview in *Al-Sahafa* newspaper, 19 January 1980).

The Shari'a judges are subject to a code of moral conduct similar to that expected of jurists in other parts of the world, that is, a just and impartial attitude toward plaintiffs and defendants and a high personal standard of behavior in public and private life. The question of corruption is rarely raised in connection with a judge for until very recently corruption has not been a feature of Sudanese politics, law or the bureaucracy. The law does differentiate between a 'bribe', a thing which is against the Shari'a and specifically condemned by the Prophet, and a gift (*hiba*) which may be made to a judge by a relative or friend who was accustomed to giving gifts to the Qadi before he became a judge. However, any gift given in association with a case before the judge is assumed to be a bribe. The same applies to judges accepting invitations to attend social occasions such as weddings, circumcisions and other festive occasions which might be considered as compromising to his impartiality.

Following a similar line of reasoning about any activity which might compromise the behavior or judgment of a Qadi, the Shari'a does not permit a judge to engage in trade or commerce. The interpretation is based on the saying attributed to the Prophet of Islam that 'a [ruler] who trades with his people cannot be just'. As an official in the community of Islam, the judge cannot be taken away from his main work in the courts and the risk of conflict of interest is sufficiently great for mercantile activity to be forbidden.

Arabic is the national language of the Sudan and is the language of the Shari'a courts. The judges are admonished to use only Arabic in the courts and not to resort to the use of another language which would not be understood by all of the participants in a case. English is widely known by educated Sudanese and Arabic may be the second or third language of many Sudanese outside of the central urban areas of the north. When Arabic is not a language understood by the litigants, it is the judge's responsibility to arrange for translation in court. I would add that court sessions are conducted in colloquial Sudanese Arabic rather than the classical language of the Qur'an and scholarly discourse. The Qadi is thus a figure of authority, in the sense that his/her legal opinions are authoritative, but Islamic judges

are not removed from those over whom they preside by a specialized language or jargon.

The accepted dress for a First or Second Class male judge is simply the traditional dress for a Sudanese man, the long white jellabiya and the turban-like *'imma* which is wrapped around the head over the orange skull-cap, the *tagia*. Dress for a woman judge is a simple white *tobe*, about eight meters of light cloth worn over a Western style dress. Province judges, Appeals and High Court judges wear the garb of a traditional Sheikh or learned man, the jellabiya and *'imma* with a floor-length cloak or *jibba* made of light wool or some heavy fabric of a dark color.

Occasionally experienced judges are seconded to other Shari'a court systems in other countries where there is a particular need. The judge may take a leave of absence and then return to his post. All of the judges are subject to the authority of the Grand Qadi.

SPECIALIZED PERSONNEL ATTACHED TO THE SHARI'A LEGAL SYSTEM

The Mufti

The Mufti holds a position of importance second only to the Grand Qadi and since the reorganization of the Sudan Judiciary in 1980 the office of the Mufti has proved to be more durable than that of the Grand Qadi. The office of Mufti is traditional in Islamic law, and the term itself is derived from the Arabic root meaning 'to open'; the Mufti thus opens the door to interpretation through the issuance of legal opinions called *fatwa* (pl. *fatawa*). The position of Mufti has occasionally taken on political and social importance as orthodox opinions regarding, for example, birth control or female circumcision, are elicited. An official view representing the Islamic establishment is issued and circulated in the printed media on such occasions and this view becomes a religious-legal standard by which future behavior is measured as lawful or not. It should be pointed out that the weight of social custom may be greater than the effects of the issuing of a *fatwa*; for example that issued on the matter of the circumcision of females and the attitude of Islam had virtually no effect on the Sudanese Muslim population, except to give the old agitators a new line of argument.

The day to day work of the Mufti is much more prosaic dealing with responses to inquiries made by citizens on a variety of questions relating to the Shari'a from specific matters of inheritance to an appropriate waiting period for marriage. Any question relating to the interpretation of the Shari'a is a valid consideration for the Mufti. The obtaining of a legal opinion before the fact rather than after has the effect of

preventing or controlling conflicts between individuals in matters of personal law. The heirs of an estate who hold property in common may request a legal opinion from the Mufti as to the possible division of the estate along correct Shari'a lines and thus avoid intra-familial conflicts.

The juridical area of *iftah*, or the method of the science of legal interpretation, has been considered important enough for a major part of Circular no. 60 to be devoted to its philosophy as applied in the Sudan. Written by Sheikh Mohammed Al-Gizouli in 1973, it is a concise statement of the legal role of the Mufti.

The function of *iftah* is to show the Shari'a rule or law governing particular events which are submitted for legal interpretation. The method followed in *iftah* depends first on taking the facts as provided by the *mustefti* (one making the inquiry) from which the Mufti will issue a *fatwa* on the presumption that the facts are correct. This is why each *fatwa* or legal opinion is preceded by the statement 'if what was mentioned is true then ...' (the legal interpretation follows).

(Fluehr-Lobban, 1983)

The *fatwa* thus issued by the Mufti is not subject to the normal Shari'a rules of evidence or procedure and it is not at all like the conduct of a court case. There need be no congruence between separate *fatawa* even though they deal with substantially the same events. As the Circular says, 'The Shari'a judge is bound by Hanafi law, but there is nothing binding on the Mufti'. For the most part, however, the legal opinions are interpretations according to Hanafi law, but the *fatwa* itself is not binding and has no legal effect other than to state an official Shari'a opinion to the inquirer.

The Maa'zun

The *maa'zun* is the recorder of marriages and divorces and is characteristically associated with his record book, the *daftar*. A *maa'zun* or a number of *maa'zunin* (plural) are routinely assigned to work in each of the Shari'a courts. A large court like the one in Omdurman has about 15 *maa'zunin* working in connection with the court. Otherwise the work of the *maa'zun* is in the local communities where he may be the only official connected with the Shari'a to have a role in the personal affairs of local residents. In the *maa'zun's* books are recorded the details of the marriage contract with the names and agents of the bride and groom, the witnesses, amount of the dower and the date of the marriage. Divorce, only by repudiation, is recorded by its type (revocable,

irrevocable; first, second or third instance) and the date of its occurrence with the witnesses present. The *maa'zun* is a paralegal official of the court and therefore has no right to conduct judicial proceedings – judicial marriage or divorce are out of his power.

The *maa'zunin* are chosen from among the learned men who are knowledgeable of the Shari'a without having gained any specialized training in the law. They may be Imams of the local mosques (in fact many are) and they may have studied Islamic theology privately in the mosque. The *maa'zun* must be of good character and reputation and he must be literate.

Salary is taken from the *maa'zun's* fees of which he takes 50 per cent and the court the other 50 per cent. The *maa'zun* is entitled to one per cent of the dower paid at the time of the '*agid*' or marriage contract signing, but usually he is paid more; a dower of £S500 would entitle the *maa'zun* to a £S5.00 fee for his services. The arrival of the *maa'zun* at the '*agid*' marriage ceremony is an occasion for particular joy and the ululating cries of happiness from the women's quarters accompany his entrance into the house. Some wedding songs begin with the announcement of the coming of the *maa'zun*.

The work of the *maa'zunin* is supervised by the courts and their correct or incorrect judgment at the time of marriage can often be critical. The *maa'zun* should advise the parties as to the legal requirements of a Muslim marriage and he should pay special attention to make sure the amount of the dower is agreed to on both sides and that the consent of the bride is assured. If he suspects some irregularity, for instance the substitution of another relative for the woman's marriage guardian who is normally her father, he should make an inquiry or withhold his service until the situation is clarified to his satisfaction. With respect to divorce, the *maa'zun* should be acquainted with the law and the reforms in the law regarding obedience of wives in marriage and apprise the husbands of these facts.

The following case involving a kind of malpractice by a *maa'zun* came before the Grand Qadi because of its immediacy; I was working with the Grand Qadi when we were interrupted by two very agitated men. They related the following:

A few days ago a marriage contract signing ('*agid*') took place whereby the father of the bride and the witnesses performed the ceremony because the *maa'zun* failed to appear as scheduled. The wedding party, bride, groom, their fathers and witnesses and the assembled families and guests, waited and waited for the *maa'zun* and when he didn't appear, they drafted and signed their own contract. When the *maa'zun* finally came he said that the procedure

they performed was invalid and he refused to register the marriage. The couple were scheduled to leave in a few days for America for two years, and the bride had been unable to obtain a legitimate leave from her work-place at the bank until she proved that she was leaving to accompany her husband for work-related purposes outside the country.

The father and husband's agent pleaded for the High Court to intercede which it promptly did by legally registering the marriage.

(Observed in the Grand Qadi's office, 13 October 1979)

The case, while not without its humorous aspects, nevertheless deserved serious attention and the Grand Qadi, Sheikh al-Gizouli, assured me that the *maa'zun* involved would be reprimanded.

The *maa'zunin*, then, shoulder a considerable burden regarding advice and authorization of legal affairs locally without being educated formally in the law. They tend to be clustered in urban areas and towns and, as a result, the record-keeping is much more reliable in these locales; in the remote areas of the countryside a *maa'zun* may travel with the Shari'a judge once or twice a year to hear cases and record marriages and divorces for that period. Some areas may never be reached, and probably they are governed by their own customary law in any event. It is a major problem for the Sudan and for the Shari'a courts that such record-keeping is not compulsory. Vital statistics are lost to the government, and subsequent to the events claims regarding marriage and divorce are raised in the courts with no certain method of proving the details of the marriage or divorce.

The Use of the Police in Shari'a Courts

The Sudan Police Force is a national force and the police are assigned to various governmental agencies and institutions, including the courts, Shari'a, Civil and customary. The police have the authority to execute any decree by the court which requires their intervention. A warrant for the arrest of a person or a summons for an essential witness who has failed to appear are appropriately carried out by the police. The more routine summonses are delivered by an authorized agent of the court, not the police.

Typically, if an ex-husband has failed in his maintenance payments he may be arrested by the police and brought to court for an investigation as to why he has not followed the order of the court to pay *nafaqa* to his wife. Usually the man is not imprisoned for his neglect, for that only compounds his inability to pay his wife the support which is due to her, but the court, through the sanction of police involvement, will contact

the employer and require that the *nafaqa* be taken as a portion of his monthly salary.

The police may also be used in child custody cases where the parent refuses to hand over the child to the court's authorized custodian. The police are called upon to intervene in these painful cases as disinterested third parties enforcing the law. According to the judges interviewed on this point, it is most often mothers who resist the court order to relinquish custody of their children.

A bitterly resisted element of the use of police force was in the cases of *bayt eta'a* where the law formerly allowed the forcible return of wives who had fled their husbands' houses. This was ended in 1969 by removing the use of police intervention in *ta'a* (obedience) cases.

Because of the highly personal and emotional nature of the cases which are heard under the jurisdiction of the Shari'a courts, police are assigned to the Shari'a courts and maintain a presence in the event of outbursts. Many judges will not allow canes or walking sticks to be brought into the courts. Occasionally violence has erupted in the high emotion of a case in progress and a quick response from the police is required to prevent its escalation. Compared with civil cases, sensitivities can be very great in matters dealing with women and relations between families, and reporting of the Shari'a cases is kept strictly confidential.

Two policemen are stationed at Khartoum Shari'a court where they function to maintain order as the litigants await the hearing of their cases. If there has been trouble outside the courtroom, or if the judge suspects there may be some disruption of the proceedings, he will instruct one of the policemen to be present during the trial. The policeman represents the state, and the threat of the use of force, or any serious outbreak, will be met with arrest and fine or imprisonment.

Disruptions are in fact rare and when they occur they are more apt to be like the following:

An elderly man, uneducated and from a simple, rural background, was brought into court by a policeman. The policeman reported that the old man had come to court for a relatively simple matter, but that he had tried to get the Chief Officer of the court to change the contents of the *tawkil* (a simple legal documentation) which the judge had ordered. The Chief Officer naturally refused and the old man began to insult him, calling him a fool before the judge. The judge informed him that Article 272 of the Sudan Penal Code gives him the right to imprison anyone for disturbance to the court for three days. He lectured the old man about respect for the court. He directed the policeman to take the man out and give him some time to cool down and think about what had been said. After some

time the old man had reconciled with the one he had insulted and the President of the Court (the Province Judge) on hearing the details recommended that he be sent home without any further action. The old man apologized to the judge, thanked the policeman and had his *tawkil* written up properly.

(Observed Khartoum Shari'a Court, 29 November 1979)

The mistake of the old man in this episode was not in attempting to alter the legal document, although that is reprehensible, but in disturbing the proper decorum which should operate in the court. By creating a scene he involved the police officer who was bound to take some action. A younger, more sophisticated man would have suffered a greater penalty for such behavior.

SETTING AND ATMOSPHERE OF THE COURTS

Before I began systematically to record information on cases, I visited the Shari'a courts on a number of occasions to form some impressions of their operation. I had this interest from a study of courtroom behavior in Philadelphia Lower Criminal Courts which I conducted for my master's thesis in anthropology in 1968. There I had observed the courts strictly from the point of view of the social interactions in the formal court setting among the various participants in the courtroom drama. With many of the preconceptions from that experience in the American criminal courts in mind I found some striking differences in the setting, mode of behavior and general atmosphere of the Shari'a courts.

The Shari'a courts are in a separate location from the busier, better-endowed Civil courts. In Khartoum the courts are in a three-story office building near to the central Shari al-Qasr or Republican-Palace Street. In Omdurman the courts are centrally located as well, next to the main municipal buildings just after the White Nile Bridge. In the local towns the Shari'a courts are generally situated near to the commercial and bureaucratic centers of the towns.

As one enters the gateway to the courts and encounters the courtyard waiting area, the first impression is of women, often with children, and the poorer segments of society. The cost of litigation is no barrier to coming to court, yet those with the least to lose socially and the most to gain from the intervention of the courts are the poor. Women with greater financial means are represented in courts by their family agents, usually fathers or brothers, or by advocates.

Naturally, there is much activity in the courtyard — clerks are busily drafting petitions which are summaries of events and the first stage in the raising of a complaint which can lead to a full-fledged court case

(*qadia*) – the *maa'zunin* assigned to work in the courts are recording the latest marriages and divorces – a separate section just for estates is issuing decrees for uncomplicated inheritance cases – and the police and court officers are directing people to the appropriate offices and courts and generally are maintaining order. There is no question that the presence of the police is a reminder that the courts are authorized by the state and operate in a secular society. In fact, there are no real outward signs or symbols that suggest religiosity or the sacred side of the function of the courts.

The courtrooms vary in size and accoutrement according to their level in the hierarchy of the legal system. Second Class courts are generally busier and one *qadi* told me that he regularly hears up to ten cases a day in his Second Class court which sits from 9:00 a.m. until about 1:00 p.m., when most offices and businesses close due to the intensity of heat in the afternoon. First Class and Province courts have a somewhat less hectic schedule because of their more specialized jurisdiction and being courts of appeal.

As a general rule all of the courtrooms are simply furnished, with a large desk for the judge, wooden-framed armchairs on either side of the desk for lawyers, witnesses, or guests, like myself. Over the judge's desk hangs a picture of President Jaafar Numieri (later deposed), another significant symbol of the state in the court setting. Some of the courts are air-cooled or are kept dark to protect against the 100°F-plus temperatures which are standard most of the year. The courtroom of the Province judge and president of the courts in a particular locale is the largest room, with a separate area for the judge to wash and don his robes. While court is not in session, there is much activity in the president's office with documents to be signed and advice to be given as the head of the court.

In all of the courts there are no real barriers placed between the judge and the litigants. As the case begins the plaintiff and defendant or their representatives approach the judge at his desk, evoking the scene of a pupil before the teacher's desk and comparable in social content as well. The judge is both a figure of authority and an authoritative figure; he directs the case, guides the investigation and explains and applies the law in which he is a specialist. The raised bench of the Western judge with the plaintiff and defendant looking up is reversed; in the Shari'a courts, the judge is seated and the litigants look down at him. The respect and the deferential behavior are there, but those involved with a case are not put in awe of the court by its imposing physical structure, nor by a judge seated above them. There is really no specialized dress or language that is associated exclusively with the courts, except that the judges are addressed as 'Moalana'. Proceedings are conducted in

colloquial Sudanese Arabic (a fact which made my own comprehension of court proceedings very high), and I have even seen a case where a government bureaucrat was chastized by the judge for trying to speak in a form of the language that was above those present in an effort to impress the court. There are no special judicial robes, as mentioned earlier, and judge and litigant may be dressed alike in the traditional *jellabiyya* and *'imma*. While Civil court judges dress in Western-style or African-style suits, a Shari'a judge wears only traditional Sudanese male dress. In short, there is little that is truly intimidating about the courtrooms themselves other than the rather abstract notion that Allah's Holy Law is applied here by religiously trained men, and the only physical reminder of this is the Qu'ran which rests on the judge's desk for oathtaking.

The conduct of court sessions is serious business although it lacks the formality and ritual I had witnessed in the American criminal courts. There are no court criers, bailiffs or court stenographer and the observation of a single case in the Islamic courts is sufficient testimony that the legal traditions are quite separate. The judge begins the case by inquiring of those present their names, relationship to those present, and occupations. From the case summary which he already has, it is immediately apparent who are the litigants and who are their witnesses. All that transpires is recorded in script by the judge, a fact about which there is a great deal of complaining due to the amount of time spent in recording the case. The testimony of plaintiff, defendant and witnesses is not taken down verbatim, but is usually summarized by the judge as it is being heard. The tone of the session varies according to the different personalities of the judges and their approach to the application of the law. Most possess a demeanor of impartiality and dispassion, but others may expose their feelings in a case by their commentary and questioning. This is the prerogative of the judge as one who both investigates and gives final judgment in a case. A stern lecture may accompany a relatively lenient judgment, and the outcome of a case is as often a lesson in correct Muslim behavior as an enforceable decree. It is obvious that the intention of Shari'a judgments is not to punish but to instruct, and compliance with the judicial order is at first voluntary and the state is called upon only when this fails. The operation of the courts has elements of both hierarchical organization and democracy. There is no questioning the authoritative and sacred sources of the law and the judge's power in the court, but strong features of Sudanese egalitarian social organization remain and the behavior of litigants in court is neither submissive nor passive.

Contempt of Court

There is occasionally an unclear line between defense of one's cause and inappropriate behavior in court. I observed a case where a woman was dissatisfied with the outcome of her case and slammed the door on her way out of the courtroom. The judge called her back and said she was in contempt of the court and fined her £S100.00.

On another occasion I saw the culmination of a judge's exasperation with the refusal of a witness to respond to repeated summonses from the Shari'a court. Finally the police were sent to bring him from his place of employment, one of the banks in downtown Khartoum. When he finally appeared in court he was reprimanded strongly by the judge who sought, perhaps, to make an object lesson of his disregard of the court summons. He lectured him that it is especially important for educated, professional people to respect the law, and switching from Arabic to English (perhaps to demonstrate his own level of education) he said, 'You know you can be sent to prison for this offense, but you are lucky, I am just going to fine you £S14.00'. The man was humiliated before the court and adopted a very penitent attitude. To add further to his shame for being held in contempt of court, the judge ordered that the reluctant witness be returned to his office by police escort. This act by this *qadi* may be considered excessive by other judges, but was adopted as a course of action to demonstrate the seriousness of avoiding a summons.

THE SHARI'A AND THE SUDANESE NATIONAL COURTS

Until 1980 the civil and Shari'a sections comprised the two major parts of the national legal system of the Sudan. The process of unifying the two systems began in 1980 and while still incomplete was interrupted by the 1983 Islamization of Sudanese state law. Traditionally the larger, and in a sense the more prestigious section has been the civil structure representing 517 of 782 judges currently employed by the Sudan government. The Shari'a judges, numbering about 250, are not only inferior in numbers; they are paid less and believe their jobs to be of lower status socially than the civil judges. As government employees the salaries of all judges is not especially high and in recent years many have migrated or sought jobs on secondment in the petroleum-rich Arab countries. In 1980, 244 Sudanese judges were working outside of the country, and this number increased sharply in the latter years of the Numieri regime. The overall operating efficiency of the courts in general is thus proportionately reduced.

Under the original Transitional Constitution of the Sudan in 1956,

the two major sections of the judiciary were continued, as they had existed under colonial rule, with a Supreme Court constituted of 30 members, 21 civil and nine Shari'a. The High Court judges could be removed only by impeachment proceedings in the People's Assembly. In fact the People's Assembly did not function for many of the intervening years after independence, as for 19 of the last 25 years the Sudan has been governed under military rule (Gen. Ibrahim Abboud, 1958–64; Gen. Jaafar Numieri, 1969–85). The judiciary, which was originally meant to stand between the state and the individual, has in fact moved closer to the executive branch of government. In 1973 the Permanent Constitution drafted by the Sudan Socialist Union created a High Judiciary Council which consists of the President of the Council, the Attorney General, the Chief Justice, the Grand Qadi and various ministers who advise the President of the Republic on the appointment, promotion and dismissal of judges. The judiciary is under the wing of the executive and the consistent, democratic call for an 'independent judiciary' has been one of the features of Sudanese politics in recent years.

There has always been a certain tension between the Civil and Shari'a sections, but this has been mitigated by their quite separate jurisdictions. The attitude of some civil jurists may convey a sense of superiority that the concerns of their law, both criminal and commercial are more relevant or 'modern', while the Shari'a judges, for their part, may view the civil jurists as 'agents of westernization' that is undermining the Islamic basis of society. Since most of the practicing civil judges are Muslims themselves, they may not appreciate the Shari'a as jurisprudence, but might perceive it on a subjective basis. For example, in the current unification move, some civil judges thought that their being Muslim was sufficient to apply Islamic Shari'a in the courts, without additional legal training. In essence, each system of law sees the amalgamation as an opportunity to influence and direct the other, making the civil law more Islamic or the Shari'a more secular.

SHARI'A COURT STATISTICS

The following tables include figures for case frequencies in the Islamic courts of the Sudan over the ten year period, 1969–1979. Certain tables are comprehensive for the entire country of the Sudan, while others focus on the major urban area of the three towns, Khartoum, Omduman and Khartoum North.

Certain selected areas of the Islamic personal status law have been chosen for close attention, for example the matters of marriage and divorce shown in Tables 5 and 6. A calculation of the percentage of

divorces to that of marriages in a given year as reported in the *maa'zuns*' record books, both for the Sudan as a whole and for the three towns, was thought to be of sufficient interest to attempt to show a crude divorce rate.

Nafaqa (maintenance) cases have consistently shown themselves to be the most common problem coming before the Shari'a courts (see Tables 1 and 2). Support is primary and is sought by women in preference to divorce, although chronic lack of support is a firm ground for judicial divorce. *Ta'a* (obedience) is closely related to maintenance for a husband is not bound to support a wife who refuses to cohabit with him and is therefore disobedient. Repeated obedience rulings from the court often lead to divorce. The statistics for the three towns show a sharp increase in divorce, especially in the period 1975–79, amounting to an overall 40 per cent increase in divorce in the ten year period. The figures show only 18 per cent increase in divorce during the same period for the Sudan as a whole, reflecting the more dramatic increase in the major urban area.

TABLE 1

Shari'a Court: * Case Frequencies in Selected Areas over a 10 Year Period in the Three Towns (Khartoum, Omdurman and Khartoum North)

	<i>Nafaqa</i> (Maintenance)	<i>Talaq</i> (Divorce)	<i>Ta'a</i> (Obedience)	<i>Hadana</i> (Child Custody)	<i>Zowaj</i> (Marriage)
1969–70	1893	649		1066**	19
1971–72	1486	673		975	2
1972–73	1784	688		1174	0
1974–75	1782	748	970	359	10
1978–79	1511	1053	715	378	5

TABLE 2

Case Frequencies in Selected Areas for the Sudanese Shari'a Courts

	<i>Nafaqa</i>	<i>Talaq</i>	<i>Ta'a</i>	<i>Hadana</i>	<i>Zowaj</i>
1969–70	10,417	5444	8397		91
1978–79	10,158	6585	6404	2491	

* All statistical data has been courtesy of the Department of Statistics, The Sudan Judiciary; special thanks to Mahassin Hassan and Hon. Justice Nagua Farid.

** *Ta'a* and *hadana* reported together until 1973.

While divorce is increasing, there is a decrease in *ta'a* cases of over 25 per cent in the three towns from 1975 to 1979 and an overall decrease in ten years in the Sudan of 23 per cent. This coincides with general social trends in the country, as well as the abolition of *bayt eta'a* in 1969. Marriage in court is still quite uncommon, although certain tensions regarding consent in marriage express themselves in complaints later requesting divorce. Marriage occurs in court if there is no marriage guardian to act on behalf of the bride or if the couple cannot obtain the permission of the marriage guardian and wish the judge to act in this capacity.

To give an impression of the general work of the Shari'a courts in the three towns during a given six months period, the following statistics are offered. The period covered is 1 January 1979 to 30 June 1979. The number of cases of the first instance heard was 3406, while cases heard on appeal numbered 349. *Tazdiqat*, simple legal documents establishing agency, notarizing a marriage contract or giving legal testimony to certain facts, were the most numerous petitions heard before the court, at a figure of 6296. Estates, always the regular business of the Shari'a courts, numbered 2768. *Ish-hadat*, applications for legal documents which establish certain facts on the basis of the testimony of witnesses, numbered 1637. A statistical breakdown of *ish-hadat* issued in the three towns for a one year period is given below, p. 78. Applications for *tenfizat*, or documents which enforce a legal decision, numbered 400. *Fatawa*, or requests for an official Shari'a legal opinion on any subject numbered 137. The more complicated requests would normally be referred to the office of Mufti. *'Ilamat*, which give power of attorney and are often issued in conjunction with the disposition of estates, numbered 95.

TABLE 3
Statistics of the Shari'a Courts for the three towns
from 1 Jan. 1979 to 30 June 1979

	Cases of First Instance	Estates	Cases of Appeal	Tazdiqat
Khartoum	1122	687	146	2408
Omdurman	1272	1308	126	2401
Khartoum North	1012	773	77	1487
Total	3406	2768	349	6296

TABLE 4
Selected Cases heard before the Shari'a Courts in the three towns
from 1 Jan. 1979 to 30 June 1979

	Marriage	Child Custody	Obedience	Maintenance	Divorce
Khartoum	0	72	90	198	187
Omdurman	0	97	121	250	196
Khartoum North	2	63	79	339	137
Total	2	232	290	787	520

TABLE 5
Marriages and Divorces Registered with Maa'zuns in the Sudan, 1966-70

1966-67	With local maa'zun	With maa'zun in Shari'a court
Marriages	21,449	27
Divorces	7,741	172
1967-68		
Marriages	18,483	36
Divorces	7,371	260
1968-69		
Marriages	20,529	52
Divorces	7,531	330
1969-70		
Marriages	21,130	31
Divorces	7,645	381

The proportion of divorces registered to the number of marriages registered averages 36%. As shown in types of divorces registered (Chapter 6) the vast bulk of divorces are of the single, revocable type, amounting to 70% of the total. This is not a divorce rate, but a simple indication of the relative numbers of divorces to marriages registered with the *maa'zun*.

TABLE 6
*Marriages and Divorces Registered with the Maa'zuns
 in the three towns, 1975-8*

1975	Khartoum	Omdurman	Khartoum North	Total
Marriages	2413	1833	1262	5508
Divorces	918	653	390	1961
1976				
Marriages	2193	1963	519	4675
Divorces	864	379	321	1474
1977				
Marriages	2352	3483	2051	7886
Divorces	952	394	766	2112
1978				
Marriages	1823	3047	605	5475
Divorces	574	351	220	1145
Total Marriages				23,544
Total Divorces				6,992

The proportion of divorces registered to the number of marriages averages over 4 years 28.4%. A more accurate frequency of divorce can be computed using these statistics for the three towns because registration of marriage and divorce is accepted practice in the major urban areas.

Ish-hadat, legal documents based on the appearance of witnesses, that were issued in the three towns for a one year period, July 1, 1978-June 30, 1979, included 40 involving marriage, two in divorce, 483 *Hiba* or gift cases, 869 *Sulh* or peacemaking agreements, 21 wills and 92 conversions to Islam.

The Islamic conception of gift giving as a legal exchange is unique in world jurisprudence, although it simply formalizes what other societies accept as informal exchange of gifts or items of value between family members or friends. *Hiba* in Islamic law in the Sudan has been carefully separated from inheritance, which is another legal matter entirely. Gifts, once registered in the courts through the process of *ish-had*, whereby two persons are brought to bear witness to the exchange, are inviolable, except by the gift-maker and receiver themselves.

The large number of *sulh* cases at once testifies to a certain amount of tension in the society, but also to an adequate legal means for the amicable settlement of problematic relations. 'Making peace' can occur between any two individuals previously embroiled in a serious quarrel to which they have now arrived at a suitable resolution. That solution is announced and formalized through the *ish-had-esulh* which is witnessed and documented.

Conversion to Islam need not take place in court and may simply be done in the presence of two full Muslim witnesses. However some may wish, for legal purposes, to have the act of conversion to Islam take place in court. I witnessed such a conversion in Khartoum Second Class court on 27 January 1980, and herewith summarize its legal-religious features.

An Ethiopian from Harar, whose father was Christian and whose mother had been Muslim, but converted to Christianity for her marriage, appeared in court to announce his desire to convert to Islam. He had been raised as a Christian in a region where Islam and Christianity coexist. He had wanted to convert to Islam for some time but his father refused to permit this; so he left home to work in the U.S. And when finally he came to the Sudan to work for Chevron Company he decided it was the right time to take this step. An Australian co-worker, who had also converted to Islam, had the most immediate recent influence on him. After this background story was told, the process of conversion began. The judge asked the applicant to recite the *shahada* (testimony, 'There is no God but Allah and Mohammed is His Prophet', recited in Arabic) three times following the words of his Islamic teacher, who accompanied him to court. After this the judge asked the convert what was his former name to which he replied 'Gezoul', and he asked what would be his Muslim name and he said 'Mohammed Salih'.

The judge recorded this and certified that conversion had taken place on this date in his court. A copy of the document would be prepared in English for the Ethiopian convert, whose Arabic was limited. After this, tea was served and the convert congratulated by the judge, his teacher and his second witness. No court fees are taken in cases of conversion.

With respect to will-making, although the law has liberalized the ability to make bequests on behalf of heirs or non-heirs since 1945, it would appear from the statistics that these prerogatives are not exercised frequently, at least not in court. A will can be validly drawn up outside of court, but registration in court does safeguard against future claims by heirs against the disposition of the estate.

NOTES

1. Since the 'May Revolution' of Jaafar Numieri a number of revisions of provincial boundaries and names were proposed without any resolution.
2. The Honorable Justice Ihsan Fakhri was the first woman appointed as a Civil judge in the Sudan in 1961.

CHAPTER FOUR

THE STATUS OF WOMEN IN ISLAMIC LAW

Perhaps no other topic in Islamic law has drawn such attention in the West as that of the purported low status of women in Muslim law and society alike. The Muslim woman is stereotyped as docile, passive and subjugated by men and Islamic institutions themselves. A number of negative stereotypes held in the West center around misleading notions regarding the status of women in Islamic law, most striking among these is a certain perceived lack of rights in marriage, divorce, and other areas of the personal status law. While it is true that Islam developed in a patrilineal and stratified social system, it, by no means, holds a monopoly on such systems nor is it more harshly patriarchal than Christianity, Judaism or other of the great world religions. Islamic law itself has been viewed as rigid and doctrinaire, immutable and unbending, even though its application has always occurred within the context of specific societies with distinct histories.

The recent literature on women in the Muslim countries has sought to correct the Western, male bias of earlier works (Beck and Keddie, 1978; Fernea and Bezirgan, 1977; Smith, 1980). There is also a growing literature written by Middle Eastern women perhaps influenced by Western feminism which is rather more polemical, but adds to the contemporary dialogue (Fadela M'Rabet, 1965; Fatma Mernissi, 1975; Naural al-Saadawi, 1980). Among the Orientalists' treatment of the subject is J.N.D. Anderson's comparative study of divorce law (1970) and R. Levy's chapter on the status of women in his *Islam and Social Structure* (1965) and the essays by Coulson and Hinchcliffe and White in Beck and Keddie's edited volume. J.L. Esposito has raised some interesting questions regarding the evolution and history of the status of women in Islam (1975; 1982).

Some Historical Points

There is general agreement among Islamic scholars that a central feature of the introduction of Islam was a reform and upgrading of the status of women. In the Jahiliya, Arabia before the coming of Islam, society was strictly patrilineal and patriarchal. Women were denied rights in inheritance and to any form of transferrable property. Female infanticide apparently was practiced as a response to the harsh environmental conditions of the desert which could not support every child born to the social group. Polygyny was unrestricted and women were married to their husbands by their guardians who received the brideprice as compensation for the delivery of the woman to the husband.

The coming of Islam in the seventh century A.D. must be viewed in terms of the society from which it sprang and the social basis upon which it was erected. Sura IV, *Al-Nisa* ('Women'), so-called because it deals largely with women's rights, was revealed to the Prophet Mohammed approximately in the fifth year of the Hejira at Medina, in the context of the loss of a great many men on the battlefield and the resulting concern for their wives and children (Pickthall, 1977: 73). In this Sura is contained a very clear delimiting of the rights of women, implicit in which is a substantive reform of the pre-Islamic society, and the responsibilities of men toward women, especially those whom they marry. The right of females to inherit and own property, the right to receive and dispose of their dowers, the obligations of men in marriage and the limitation of polygyny are set forward in the Sura entitled 'Women'. Other provisions regarding women, such as the *'idda* term, the length of time to suckle a child or mourn a deceased husband are contained in Sura II, *Al-Baqqara* ('The Cow'), where also the manner or the conduct of divorce is described. The subject of divorce, so controversial today inside and outside of the Muslim world, is dealt with simply in the Qur'an: 'those who forswear their wives must wait four months, then if they change their minds, Lo! Allah is Forgiving. And if they decide upon divorce (let them remember) Allah is Hearer, Knower' (Sura II: 226–7). 'When ye have divorced women, and they have reached their term, then retain them in kindness or release them in kindness' (ibid, pp. 35–5). This section has also been translated as 'either take the wife back on equitable terms or part with her on equitable terms' (Esposito, 1975). Divorce is not to be taken lightly, nor is any other matter involving the welfare and maintenance of women and children.

For many of the Muslim faithful no other rights of women, save those mentioned specifically in the Qur'an, need to be addressed. For others, those involved in various reform movements discussed in Chapter 9,

improvement in the status of women brought by Islam is a tradition upon which more extensive rights for women can be built. Both tendencies are represented in the Sudan; however, both in official Islam and in secular movements for change, the Sudan, in many ways, has been in the vanguard of progressive moves which have positively affected the status of Muslim women.

The interesting historical question has been posed as to whether the relative denigration of the position of women occurred during the long period of medieval Islam or whether an inferior status for women represents the Islamic ideal (ibid, 1975: 99). While it is difficult to trace the development of scholarly opinion on the subject of women, it is clear that the four schools of Sunni Muslim jurisprudence have differing views regarding correct practice in matters relating to women. Consent in marriage is one example, with the Hanafi school recognizing a valid marriage as contracted by the woman herself, while the Maliki school provides for the father or marriage guardian to contract a woman in marriage. Shi'ite law allows a form of temporary marriage (*al-mota'a*) while the Sunni jurists abhor the practice as a form of concubinage.

The early Muslim jurists (*foqaha*), who are the base to which the contemporary thinkers and expounders of the law inevitably return, adopted a consistent protective attitude toward the rights of women. An interesting case from as early as the tenth century, in light of current philosophical, religious and legal discussion, involves the permissibility or the use of contraceptive methods (Bowen, 1981: 323–28). Various *hadith* which do not specifically prohibit contraception were the base upon which legal arguments concerning the practice of 'azl (coitus interruptus, the primary method in use at the time) were constructed. The jurists in all of the schools excepting the Shafi'i school were in agreement that contraception interfered with two basic rights of women, the right to bear children and the right to sexual fulfillment. It followed that, since it was not forbidden (*haram*) in the Qur'an and *sunna*, its practice would be reprehensible (*makruh*). Certain qualifications could remove the incorrectness of the practice of contraception, for instance the Maliki school recognizing its permissibility with the woman's consent, but unsure of the right to consent of a slave wife who lacks the more basic right to the control of the children she bears (ibid, p. 325). In the latter circumstance of the slave wife the woman's right to sexual fulfillment in marriage conflicted with the husband-master's absolute right of ownership and control of any progeny, and the jurists sided with the property rights of the husband. Nevertheless, it is important to note that at this early date the consistent protection of the rights of women in marriage was a central feature of the determining of legal opinion regarding contraception. That rights in private property

conflicted with women's rights, as inferred from the *hadith*, and ultimately superseded them is testimony to the ascendance of individual wealth in Islamic society at least by the tenth century A.D., a time of Muslim political expansion and conquest.

THE INFLUENCE OF THE OTTOMAN PERIOD

While there has been no specific, identifiable evolution of Islamic law on the question of the status of women, nevertheless the history of the development of the law, especially in the area of family relations, has been entwined with the history of the position of women in Muslim society. That particular history is part of the overall history of the spread of the Islamic faith and the emergence of a definable Islamic society.

As Islam spread in the first several hundred years after its introduction to North and West Africa, the Middle East to Southwestern and Central Asia and Indonesia, certain customs which originated in Byzantium, Persia and Egypt were carried and became associated with proper conduct for Muslim women and men. Modest dress (which is recommended in the Qur'an for both men and women) including a head covering for men and women, veiling in some instances and the practice of separation of the sexes (*purdah*) became widely associated with Islam. The specific position of women in society varied enormously depending upon culture area, and tradition, the class position of the woman and the historical setting.

Unfortunately very little has been documented regarding the status of women in medieval Islam, especially with respect to their standing in the law and their exercise of judicial rights.

However, the Ottoman period is better documented and offers some helpful insights into that important historical period just prior to the contemporary setting when some of the most fundamental changes in the law affecting women's status have occurred. The Ottoman Empire which functioned at a time of great Turkish and Islamic influence from Southwest Asia to North Africa and the Sudan played the most significant role in shaping modern Muslim society in these regions in modern times. The European colonial empires, which were constructed upon the defeated Ottomans, did little more than adopt and change the language of administration of the political – legal institutions which the Turks had put into place. It was through Ottoman rule in parts of northern Africa, including the Sudan, that the Hanafi school of Islamic jurisprudence was introduced, officially superseding but not supplanting the Maliki law traditional to these areas.

One historical study of over 10,000 cases in a seventeenth century Ottoman Shari'a court in Anatolia (Jennings, 1978: 53–114) confirms

the active participation of women in community life and not the slightest apparent hesitation to use the courts to protect their rights. Reflecting a pattern which is not unlike the contemporary use of the Shari'a courts in the Sudan and elsewhere, the problems that brought women to court most frequently were the settlement of estates, the guardianship of children, the appointment of *wakils*, or agents, property matters and the settlement of disputes arising from marriage and divorce. During the period undertaken for study by Jennings, women used the courts with amazing frequency – 80 per cent in the early years of the 1600s handled their own cases with only 20 per cent represented by agents. Women came to court regularly, freely and openly. Manifestly, the court was accessible to them and relevant to their lives (*ibid*, p.65).

As an interesting contrast to the modern woman's growing right to obtain a judicial divorce on her own initiative, the most obvious legal impediment to the Ottoman Turkish woman was her inability to obtain a divorce to which her husband had not consented through the legal mechanism of *khula*, or divorce by mutual consent. The woman, who retained control of her property but lacked the right to divorce herself, might take her property and return to her parents' or other relative's house or, if necessary, set up her own household. But divorce was something only the husband could effect.

The economic autonomy of women militates against the dependence on husbands for support and is illustrated in the record of cases of land and property transfers, which varied from 31 per cent to 48 per cent of such transfers involving at least one woman (*ibid*, p.99). Women sold land and buildings more frequently than they bought them, perhaps disposing of inherited wealth, but the sale of these properties should have given the women in the town under investigation (Kayseri) considerable cash to hold or re-invest. One conclusion of Jennings' research is that Muslim women, at least in the seventeenth century Ottoman towns, utilized the courts on a par with men, that is as need arose, and that they exercised significant control over a sizeable proportion of the town's individually owned wealth. This contrasts with the view of women often portrayed by historians and anthropologists alike with respect to the subordinate position of women in both Muslim law and society. This view regarding the low status of women in Islamic society stems from a rather too formalist interpretation of the Shari'a law without the necessary articulation with the realities of particular societies at particular moments in time.

Unquestionably, the reaction to the Ottoman occupation of the Sudan (1821–84), known for its harsh rule and strictly commercial interest in the country, had a contributory effect on the position of Muslim women in nineteenth and twentieth century Sudan. There is some

suggestion that it was Ottoman rule which introduced the practice of forcibly returning wives who have fled their husband's house, called *bayt eta'a*, which has only recently been abolished in the Sudan and Egypt. Undeniably this law has had an oppressive effect on the rights of wives for many decades. Although it was enforced by Shari'a courts the practice is probably not Islamic in origin. The success of the Mahdist movement can be measured by the relief brought to thousands of Sudanese from the oppressive Turkiya regime in a magnificent blend of religious motive and political action which ousted the Turco-Egyptian occupying army in 1884. As so often is the case in the wake of the social upheaval which is part of wars of national emancipation, a period of internal purification and social austerity ensued. In the process a strict behavioral code for women was instituted which mandated wearing of the *tobe* in public, restricted movement outside of the home and forbade speaking to men who were not relatives. The tightening social reins around accepted conduct for women was also part of the forging of the first indigenous Sudanese national entity and the growth of the major ethnically heterogeneous city of Omdurman, which attended the birth of the Mahdist state. The social patterns which developed during the period of the Mahdiya (1884–98) emphasizing confinement of women, a strictly enforced moral code and attendance to domestic tasks alone, established the standard of the appropriate feminine role in post-Mahdist Muslim Sudan extending into the twentieth century. It was left to the anti-colonialist struggle to reawaken the political involvement of women epitomized in the pre-Ottoman era by the heroine Mihera Bint Abboud who rallied her Shaggiyya people to fight against the invading Turco-Egyptian army in 1820.

THE SHARI'A AND WOMEN

In most Muslim countries, with the exception of Saudi Arabia, Pakistan, Libya recently, and now the Sudan, Islamic law has been relegated to the status of personal law governing family relations and personal affairs between Muslims. This is partly due to the influence of the Ottoman empire which went a long way in secularizing Islamic law and retaining its 'pure' features mainly in the area of family law. The colonial governments continued the trend, instituting Western-based codes for commercial and civil law and separating Islamic law from these codes, leaving it to personal matters alone.

The status of women, of course, is intimately connected with the Shari'a law of personal status involving, as it does, marriage, divorce, maintenance of women and children, guardianship and custody of children and the inheritance law. Some of the more pervasive and

misleading views of Islamic law involving the status of women rest with rather simplistic notions of the law regarding marriage and divorce.

The tenets of the Shari'a regarding polygyny have received wide popular and negative attention although, from an anthropological perspective, the majority of the world's societies allow polygyny. The legal limit of four wives is not well understood, nor is the reformist nature of the ban on unrestricted polygyny appreciated. The Qur'anic injunction is to treat each wife equitably and in the law this equity is established in terms of housing, clothing, maintenance of the wife and children, and even conjugal visits. Some progressivists in Islam interpret the inability of any man to treat two or more wives with absolute equity as a divine intention for monogamy (Jamil Hanafi, 1970).

The social reality is that polygyny in the Islamic countries is extremely low, at about one to three per cent where it has been calculated. Increasingly, under economic pressure and the pressures for reform and 'modernization', young women and men have come to prefer monogamy and the nuclear family. The marriage contract is open to include many provisions provided that they do not contradict principles of Islam. In Muslim countries there has been a dynamic interchange between legislative reform, on the one hand, and social change on the other, in various instances one leading the other. For example, as polygyny has been increasingly regarded as outmoded socially, legislative reform has been enacted in a number of countries. Specifically, polygyny was outlawed in Turkey (where the Shari'a was replaced entirely by the Swiss Civil Code) and in Soviet Central Asia in the 1920s; it was abolished in Syria in 1953, in Tunisia in 1957, in South Yemen in 1974. Likewise polygynous unions have been made more difficult or seriously restricted in the Muslim regions of the West African countries of Guinea, Guinea Bissau and Senegal and in Somalia in East Africa. The Moroccan Family Law of 1958 gives the court the power to dissolve a polygynous marriage where a complaint of unequal treatment has been proven. On a case by case basis, I have seen a number of divorces granted to Sudanese women who complained successfully of *darar* (harm) when their husbands married a second time without their knowledge or attempted to install the second wife in the same house with the first. The Iraqi law of 1961 mandates that permission from the court must be sought for a second marriage and such permission is only granted if the husband meets the required financial criteria. Likewise in Pakistan, the Muslim Family Ordinance of 1961 requires permission for a second marriage from an arbitration council (Jamil Hanafi, 1970: 113). The Egyptian family legislation of 1979 requires the consent of the first or previous wives before the husband can take another wife, or else the first wife can legally sue for divorce. So polygyny, about which we hear a great

deal in the West, is an institution socially and legally in decline in the Muslim world.

Mahr, the dower in Muslim marriage without which the marriage is not valid, is not the traditional brideprice in anthropological terminology, but is in fact a debt which is legally owed by the husband to the wife, it is her personal property and is payable to her in prompt and deferred payments at the time of the marriage contract and at the dissolution of the marriage. Usually the smaller payment is the prompt one and the larger one is deferred as a deterrent to divorce by the husband. Frequently, by tradition in some Muslim countries, the prompt payment is given by the woman to her father to help defray the costs of the wedding, but legally this is her choice and, of course, she retains sole claim to the deferred payment. As a legal anthropologist, I personally know of no other legal system in which an exchange of wealth occurs at the time of marriage where the debt is payable to the wife alone, and this represents a substantial reform proffered by Islam. *Mahr* has become one of the more controversial topics in Islamic society today as dower costs have escalated with inflationary increases and here the 'ulama have often favored a reduction or standardization of *mahr* costs, while the growing ascendancy of the petty bourgeois and middle classes has pushed costs in the opposite direction.

With respect to the choice of a partner in marriage the extended family still plays a dominant role in deciding upon a suitable spouse for a young man as well as a woman. First cousin marriage (*bint 'amm – fabrda*) is still widely preferred although its ideal may only be achieved in perhaps 20 to 25 per cent of marriages, according to one study (Lobban, 1979). The Hanafi principle, which gives final consent in marriage to the woman herself, is becoming widely accepted as the preferred legal interpretation of a validly contracted marriage (here using the principle of *takhayyur* or choice between the rich variety of opinions held by the different schools). In the Sudan there has been considerable pressure brought to bear by an organized women's movement to change from the Maliki opinion which gives the father or marriage guardian (*al-wali*) final consent in marriage, to the Hanafi provision. Despite a growing trend for young people to make their own choices in marriage, the fact that most marriages are still arranged by the families involved is often given as the main reason for the relatively low divorce rates in dominantly Muslim countries, for divorce is more complicated when it occurs between families instead of between individuals.

Property relations between husband and wife and in general the rights of women to the estates of their deceased kin have sometimes been obscured by a simplistic rendering of the dictum that a woman receives one-half that of a man in inheritance. Muslim marriage does not convey

community of property between husband and wife, as lineal relations are favored over affinal ties. Throughout a marriage a husband retains full possession and control of his property as the wife does of hers. However, the husband and wife do have mutual rights of inheritance; if there are no children, he takes half and she a quarter; if there are children, he takes a quarter and she one eighth. In the latter, more frequent case, the largest sum of both estates is taken by the children and the close agnatic kin. Of the nine specifically mentioned Qur'anic heirs (i.e. those who must inherit their portion) six are women including the wife, the mother, daughter, grand-daughter, consanguine and uterine sisters and the remainder are the men who lack strong agnatic ties, i.e. the husband and uterine brothers, the intention being to modify and reform the strongly patrilineal system which prevailed in the Hejaz before Islam. The half-portion allotted to women stems from the attenuated public economic role which women play in patrilineal societies in some of which women are denied rights to inheritance altogether.

In the Sudan the law has undergone some evolution on the point of 'equality of standard in marriage' (*al-kafa'a fi zowaj*) which in the past has promoted endogamy within families, ethnic groups and classes. Here the Hanafi interpretation that the groom must be equal to the woman's family in religion, occupation, family standing, in blood (ethnicity) and in freedom from bondage has been transcended by the Maliki interpretation which says that equality in religion (i.e. both good Muslims) is the sole criterion in determining equality of standard in marriage.

Such changes in the law can occur in the dramatic acts of sweeping legislative reform, but as frequently they occur in case by case decisions in the gradual evolving of opinion among the 'ulama. In this respect the 'ulama have not usually played a vanguard role in anticipating change in Muslim society, but many have accepted a growing consensus for change among good Muslims often quoting the Qur'anic passage, 'Verily, Allah changes not what a people has until they change it for themselves' (Sura XIII: 12). In other cases reform has come by the unceasing resistance of women and by political accommodation to mass movements for change in aspects of the law which in practice have become intolerable. Such has been the history of the feminist movement in Egypt thus placing reform in the family law continuously on the agenda of Egyptian politics. Later in this chapter the close relationship between the Sudanese women's movement and the shift from the Maliki to the Hanafi position on guardianship in marriage is documented.

The precepts of the Shari'a regarding divorce have likewise been subject to misinterpretation. Islamic law does give the unilateral right of divorce to the husband and divorce is his prerogative and the wife's

greatest fear and ultimate source of shame. The Qur'an and *hadith* are clear in matters relating to divorce. 'Divorce is the most hateful thing which God permits.' But, of course, divorce is allowed in Islam, unlike the practice of a number of orthodox Christian sects. 'Divorce must be pronounced twice and then [a woman] must be retained in honor or released in kindness. And it is not lawful for you to take from women aught of that which you have given them' (Al-Baqara, Sura II: 229), meaning that the *mahr* is not returnable and the debt must be paid upon the dissolution of the marriage.

The unilateral right of the man to divorce has been much criticized for the power it gives the husband over the wife and for the potential for abuse. In many countries the triple pronouncement '*talaq talata*' has been modified through legislation so that it is nullified if it is uttered in passion or drunkenness. In the Sudan, since 1916, the pronouncement with clear intention to divorce must be made on three separate occasions with witnesses present (Judicial Circular no.17, ca. 1915). Even where the triple pronouncement has not been mollified, the divorce is revocable (the reform originally intended) and the husband can reconcile with the wife and take her back before she has passed the require '*idda*' period of three monthly courses.

The '*idda*' period is an Islamic innovation and is both a protection for the woman, who is entitled to full support (*nafaqat al-'idda*) during this time, and a security to the husband and his agnates who want certainty that the wife is not pregnant and therefore that the number of legitimate heirs is known.

The husband need not establish grounds for his right to divorce, but often the close relations between his and his wife's family make an irresponsible or capricious divorce an unlikely event. As marriage makes for good relations between social groups, divorce has a damaging and often destructive effect on such relations. Of course, we need comparative statistics on this point. In Khartoum in 1978, for example, 957 divorces were registered with the *maa'zuns* while 359 judicial divorces were granted (mostly to women we can presume), thus almost a quarter of the divorces for that year were completed with the intervention of the court and not by traditional repudiation. It is noteworthy that of the 957 divorces registered almost 700 were of the mildest sort, *talaq owal rajia*, the first divorce, utterly and completely revocable.

The right of the wife to apply for divorce in a Shari'a court is well-established although the exercise of this right varies considerably by custom. The shame, both for the husband and wife and for their families, of settling a marital dispute in court is very great indeed. For this reason the appointment from the court of two marriage

arbitrators, one from his and one from her side, is often a reasonable first step recommended by the Qadi and gratefully accepted by the disputing parties.

A Muslim wife can claim judicial divorce in the majority of Islamic countries on the following grounds: (1) failure of maintenance; (2) cruelty (*talaq al-darar*); (3) prolonged physical desertion (*talaq khof al-fitna*); (4) marriage without her knowledge or consent to a man afflicted with a physical or mental disease or who developed the affliction during the course of the marriage (*talaq al-'ayb*) (Anderson, 1970: 42–3). Some countries include impotence in the man as recognized ground for *talaq al-'ayb*. In the Tunisian code of 1956 it was stated that no divorce pronounced outside of a court had any legal validity. The reform in the family law of South Yemen in 1974 mandates divorce in court with equivalent rights given to women and men (Fluehr-Lobban, 1980); likewise in Somalia after 1975 and in Guinea and the Ivory Coast and Kenya which have sizable Muslim populations.

Negotiated divorce, usually initiated by the woman (called *khula*, *mubara'a* or *talaq al-mal* in the Sudan) is an original right and has not been affected by legislative reform. Also referred to as divorce in consideration of property it is an option increasingly chosen as a less shameful and socially more acceptable form of divorce. In this case the wife offers a sum of money, perhaps releasing her husband of the debt of *mahr* or relinquishing her natural right to the custody of her minor children, in exchange for the husband releasing her from the marriage. A contract similar to the form and procedure of the marriage contract is drawn up and signed with witnesses and the divorce is simply registered with the *maa'zun* without an appearance in court.

One of the most common grounds for divorce these days in the Sudan is failure of maintenance either due to unemployment or underemployment at home, or because of the husband taking up long-term residence in one of the oil-rich countries and failing in his duty to maintain his wife and family. *Talaq al-darar* is increasingly common; 'harm' is interpreted in the Sudan as mental as well as physical abuse.

So divorce is available to women and so are a number of other legal avenues of relief in the areas of *nafaqa* (maintenance), *hadana* (child custody) and matters of inheritance rights. Legal fees are not an issue as courts' costs are minimal, even to appeal a case to the High Court. If I may speak subjectively for a moment, let me say that the courts in the Sudan, at least, tend toward a certain leniency in cases where women are the petitioners, perhaps stemming from an understanding of the desperation which has brought the woman to court.

WOMEN IN THE MUSLIM SUDAN

During my initial field experience in the Sudan (1970–72) I was struck by the sharp contrast between the passive and controlled Muslim woman I had expected to meet from my readings about Arab and Islamic society, and the reality which I encountered in my relationships with Sudanese women. In my experience the women presented a strong exterior with a certain toughness of mind and spirit combined with a core that is, like most Sudanese, filled with dignity and generosity. Among women there is strength and solidarity within the patrilineally extended family that is the primary residential and social unit. Separation of the sexes is practiced in nearly every sphere of daily life, both in the household and in the public arena. There is the *hareem*, or the women's section of the house, which generally consists of the sleeping areas or bedrooms, the kitchen and a courtyard. Women visitors are entertained in this section of the house where the small children can also be found. The more formal men's reception area consists of a salon where male relatives and guests will be received. Of course, within the family there is free movement about the house among males and females resident there, and the *hareem*/salon division is most apparent when persons from outside the family are invited.

In the public arena the movement and activity of women in the urban areas is much less circumscribed than in the past or in more conservative Muslim societies. A small percentage (now about seven per cent, but steadily increasing due to economic pressures) of women work in government ministries, in business and in commercial enterprises and working women move about freely on public transportation. The *tobe*, an outer garment consisting of about nine meters of cloth which is worn over a Western-style dress, is considered appropriate public dress for Sudanese women, and is worn by most women except for a small group at the university. The movement of women is generally not restricted, unless it is by their male kin, and women conduct their own affairs in business, carefully watching the fluctuating price of gold jewelry or otherwise seeing to the management of their finances. Shopping for food, which used to be a preferred chore for men as women were more confined, is increasingly done by women. In many areas of society from which women were by tradition excluded, women are moving in; in factory work, in government bureaucracy, in the professional fields, and this slow transformation has been met with little resistance. Indeed, the official response has been positive with the opening of numerous, inexpensive day care centers for the children of working women.

In the rural areas the confinement of women has rarely been the norm as the subsistence activities of both farming and pastoralist societies

have necessitated the relatively free movement of women to agricultural areas or sources of water. Veiling and confinement, as will be seen, are features of urban life in the Arab world.

The separation of the sexes in Muslim society is not perceived as repressive or denigrating to the position of women, nor is it associated with inequity. The matter of sexual segregation is a problem only with the Western perception of that social reality and its peculiar view of the poor condition of the Muslim women. There are a number of social improvements which women and men would like to see but an end to sexual segregation is not a high priority.

With specific reference to the law, women are generally well-informed of their rights in the Shari'a, especially the important inheritance law. I cannot report with confidence at this point that women in the general population are apprised of their newer rights in the most recent reforms in the marriage and divorce laws. There are public information programs on radio and television which discuss topics of general interest in the Islamic personal law, but there is no guarantee of their success. More likely women are informed of their rights as particular cases are brought to a lawyer's attention or before the courts themselves. Most women do know they are entitled to divorce in court, but they may not have a certain idea of the legitimate grounds for which divorce may be awarded. There is a great sharing of information in the familial and social networks in which every woman is involved and that also includes advice in personal matters.

The practice of Islam is less a matter of public performance for women than for men, but the spiritual devotion to religion is subject to individual variation and not sexual difference. Women pray, most often at home, they fast during Ramadan, and they will endeavor to perform the *hajj* once or more in their lifetime.

As might be expected, education for girls in the Sudan has lagged behind that for boys, but this pattern is world-wide and not unique to Muslim societies. Thirty-three per cent of all students in primary school are girls and 23 per cent are female at the secondary school level (White, 1978: 63). The literacy rate for older females is still extremely low (at three per cent in 1973) but is comparable to rates in Egypt and North Africa with the exception of Tunisia.

On a scale of progress in legal reform relevant to the status of women (ibid, p. 60), White ranked 21 Islamic countries or areas according to legislation which had been enacted affecting marriage, divorce, inheritance and the replacement of the Shari'a with a secular code or law.¹ In this ranking the Sudan was No. 14 of 21 countries in legal reform, ranging from the more progressive Islamic regions of Soviet Central Asia, to the more conservative regions of the Arabian peninsula and

Muslim Africa. While the overall ranking of countries according to these categories of legal reform may be sound and is a useful beginning for making comparative judgments, certain of the premises underlining the categories may be questioned.

For example, reform in the law regulating the number of wives is by no means a thing which is universally desired. Many Muslim and non-Muslim African women defend and have vested interests in the continuation of polygyny. Polygyny, rather than being viewed as a restriction on women, as White suggests, is viewed as a means to increase one's personal freedom and lighten the burdens of domestic life as co-wives offer each other mutual support in certain areas of female responsibility. Pittin's work in northern Nigeria has suggested that from an indigenous viewpoint, reform is neither desired nor needed (1979).

Customs Rooted in Culture, not in Islam

Much of the negative stereotypic view of Muslim women focuses on customs which are seen as objectionable in Western eyes and, because they are found in Muslim societies, are attributed, wrongly, to Islam. Customs such as the veiling and confinement of women, thought to be Islamic in origin, belong to a particular time and stage of development of Muslim society and are not in any sense part of the formal law. Also selected for discussion of this general point is the practice of female circumcision in some Islamic areas, including the Sudan, where it is also incorrectly associated with Islam.

Veiling

The essence of the stereotyped Muslim female in the West is the veiled figure clustered with other veiled and anonymous females, the picture evoking a combination of mystery and pity. Unquestionably the facial veil is associated with Islamic culture, although the most superficial survey of the custom in Islamic areas reveals that only a small minority of the societies that are dominantly Muslim practice the custom of veiling women. These societies are concentrated in the Arabian peninsula, in Iraq and Iran, but Levantine, North and West African Muslim societies and the host of Muslim cultures in Indonesia and Malaysia do not practice veiling. The custom is virtually unknown in the Sudan and historically this has been the case except for the rather puritanical period of the Mahdiya. Today the Rashaida people in eastern Sudan are notable exceptions to the rule of not veiling the face, being recent immigrants from the Arabian Peninsula.

Historically, veiling in Islamic society has been linked to the rise of the merchant middle class and the attendant growth of cities as commerce

expanded and distinct economic classes formed (Tillion, 1964). Veiling became associated with the urban middle class and landowners whose women, by virtue of increased wealth, did not have to work outside the home. As a show of the personal wealth of the man, his women were secluded at home and went about veiled in public so that they might not be contacted and shamed by men who were neither kin nor fellow tribesmen.

Veiling is neither mandated in the Qur'an nor specifically encouraged as correct practice in the Shari'a. The Qur'an does admonish Muslim followers, both men and women, to dress modestly.

Tell the believing men to lower their gaze and be modest. That is purer for them.

And tell the believing women to lower their gaze and be modest and to display of their adornment only that which is apparent ...

(Sura xxiv)

The social reality is that dress is modest for both males and females in Muslim countries. Perhaps the best evidence that veiling is primarily cultural and not linked directly to the Islamic religion is the fact that in nineteenth century Egypt, for example, both Christian and Jewish women went about veiled in public (Esposito, 1975). Veiling has been more a statement of social class than religious affiliation.

The use of the facial veil has been an important symbol in the politics of the twentieth century. Hoda Shar'awi and her companion Ceza Nabarawi, both nationalists and feminists, made a symbolic statement by removing their veils in 1924 on their return to Egypt vowing to fight for the twin causes of national independence and the rights of women. The veil became both a target for the French colonialists and a symbol of resistance and national culture in Algeria. The French attempted to strike at the heart of Muslim Algerian culture through social programs which aimed at acculturating Algerian women to a French life-style. Public unveilings took place whereby the Algerian women were enjoined to be like French women (Gordon, 1968). Upon the success of the national liberation movement Algerian women returned to the wearing of the veil and the practice was revived to a considerable extent. The veil became a powerful cultural statement by women, many of whom were active in the independence movement, of being Algerian and specifically rejecting a European style of dress.

The veil and a more traditional and conservative (i.e. less European) dress style is experiencing a revival along with the growth of Muslim sects in Egypt, Iran and other Islamic societies in political or economic crisis. Again the veil and the dress itself are symbols of both protest,

against increasing Westernization and secularism, and affirmation of the 'Islamic alternative'. The veil, while it is associated with Islamic culture, has more to do with social history than with Islam itself.

Female Circumcision in the Sudan

The practice of female circumcision (*al-tahuur*) is widespread in the Muslim Sudan in two forms, infibulation (locally called 'pharaonic circumcision') and the less severe clitoridectomy (called *sunna* circumcision). Of the two, the practice of infibulation² is vastly more common. The operation has been extremely controversial in modern times and its association with Islam in the popular view has had the unfortunate effect of offering a rationale for its continued practice.

In a study of 3210 women conducted by a Sudanese woman doctor,³ 82 per cent were infibulated, 12 per cent had an intermediary form of circumcision and only 2.5 per cent were circumcized in the *sunna* form, clitoridectomy. The deeply rooted character of the custom is reflected in the statistic that only 1.2 per cent in the sample were not circumcized. The operation, performed by midwives primarily, is justified socially in terms of ensuring the 'cleanliness' and good moral character of the circumcized girl. Along with other aspects of a prescribed moral code for females, circumcision has become part of a set of practices and beliefs associated, wrongly, with the Shari'a or behavior consonant with being Muslim.

The British, though well-intentioned perhaps, attempted unsuccessfully for years to suppress the practice of female circumcision, especially of the 'pharaonic' type. At the height of the campaign the operation was outlawed in 1946, but this action had the effect of simply driving its practice underground. As part of the offensive by the English to clarify the position of official Islamic authorities in the Sudan on the practice of female circumcision the following *fatwa* (formal legal opinion) was issued by the Mufti of the Sudan:

Dr. al Sayyid Abd El Hadi has written a full statement, which appeared in *Al-Nil* of 25 July 1939, of the evils of female circumcision in the Sudan, explaining its social and pathological harmfulness and its injurious effects on women throughout life. He blamed, quite rightly, the educated class and persons of position for tolerating the continuance of this barbarous practice of female circumcision which has no origin and has never been known in the Islamic world, or any other country. In this statement, which needs no addition, he suggested to me that I should make clear the Shari'a ruling on this question. My answer is that female circumcision is only desirable (*manduh*), i.e., not compulsory and

that it consists in cutting off part of the clitoris. More than that is forbidden in the view of the Umm Atiyya Report: 'Circumcise but do not go too far, for this is better for appearance and gives more pleasure to the husband.' This is the female circumcision that is desirable in Islam. Other forms, such as that known among us as pharaonic, are mutilation and mutilations are categorically forbidden.

(published in *An-Nil*, 31 July 1939)

This clear statement in favor of the simpler, less harmful form of female circumcision, in the *sunna* style, represents an historic alliance of the forces of orthodox Islam in the Sudan with the reformers who have sought to eliminate or at least modify the practice. That the alliance exists is noteworthy; that its impact in society has been minimal is lamentable. Infibulation or 'pharaonic' circumcision is still the widespread and dominant form of female circumcision in the Sudan, although the practice is not traceable to any clear pharaonic influence and the connections to Islam are through tradition rather than any revealed passage in the Qur'an.

Eventual reforms in the practice rest with the cooperation of public health officials with political and religious leaders in a campaign to educate the public as to alternatives to the serious operation of infibulation. Alternatives include a shift to the religiously approved modified operation of clitoridectomy, or the recommendation that the operation be abandoned as an outmoded practice on the ground that it is only desirable in Islam and not mandated. In either case the role of the 'ulama will be an important supportive one in the progressive and humane steps that are necessary to reduce the frequency and severity of the practice.

Reform in the Law Affecting the Status of Women in the Sudan

As already stated, there is a distinct trend in the twentieth century applied law toward reform or restoration of the rights of women in the Shari'a. In the Sudan this trend has focused on the restoration of the rights of women, especially married women, with the elimination of *bayt eta'a* and legal limits placed on the husband obtaining obedience orders against his wife in a Shari'a court, the vigilance which surrounds the law regarding *waqf* such that women not be denied their full rights in inheritance and the weight of the secular government placed behind *nafaqa* (support) rulings are a few examples. Basic reform in the law has occurred most dramatically in the law of divorce, first limiting the power of the husband in the triple pronouncement of divorce, then with the evolution of the various forms of permissible judicial divorce, such

as divorce because of cruelty or inadequate support. These developments have occurred within the context of the dynamics of modern Sudanese socio-political history. They have occurred not so much as a result of the influence of English or Western culture, but as a result of internal change that has been responsive to social movements and change in practice among the community of Muslims. The reaction to British colonialism, the Sudanese women's movement, the early years of the 'May Revolution' of Jaafar Numieri and evolving norms of acceptable social behaviour have all influenced the law as it affects the status of women. The internal dynamic of change within the Shari'a itself as applied in the Sudan is also noteworthy, especially certain trends toward liberalizing the law of divorce.

The impact of the reforms contained in the Ottoman Law of Family Rights (1917), the first to alter the personal status aspect of Islamic law, was felt in the Sudan. This was accomplished first in Turkey by two imperial edicts in 1915 to provide relief and allow a judicial divorce for women deserted by their husbands and women married to men afflicted with serious diseases (Anderson, 1959: 26). The reform was applied in the Ottoman territories and certainly noticed in the areas previously under Turkish rule, such as Egypt and the Sudan. For some time discussion of reform in the law as it affects the status of women had been under way, at least since the turn of the century with the publication of Qasim Amin's book, *The Emancipation of Women*, and the social agitation by Mohammed Abduh, one of the pioneers of feminine rights in Islamic society. At least from the time of 1915 a committee comprised of both 'ulama and lawyers under the chairmanship of Mustafa al-Maraghi, then Sheikh of Al-Azhar University, took up the question of reform in the law of marriage and divorce (ibid, p. 27).

The Sudan acted to introduce many of the reforms under discussion in the pathbreaking Judicial Circular no. 17 issued about 1915. This Circular opened the way for all future reform by admitting, for the first time, the possibility of judicial divorce for women. The Circular recognized the validity of the application for divorce in a Shari'a court by women on the grounds of non-support, desertion and cruelty.

It must be noted that in this major reform the Sudan preceded Egypt by at least four years and that in numerous areas of future reforms the Sudan took on the role of pioneer in promulgating and applying new interpretations of the law. The close relationship between the 'ulama of Egypt and the Sudan already in place before the imposition of the colonial entity, the Anglo-Egyptian Sudan, was formalized in the joint governance which characterized the Condominium Agreement. The Egyptian Grand Qadis of the Sudan, one of whom was Mustafa al-Maraghi, either assessed that local conditions in the Sudan were better

suited to certain of the earlier reforms or they sought to experiment with the reforms first in the Sudan before they were applied in Egypt. The historical evidence tends to support the former position as the Egyptian family law reforms of 1920 and 1929 preceded their comparable developments in the Sudan by several years.

The Sudan is thus established, although this is little recognized, as one of the early pioneers in the reform of the personal law of marriage and divorce, in enacting a series of laws regulating the right of women to judicial divorce, restriction of the unilateral male right to divorce and the triple pronouncement and the age of marriage (Judicial Circulars nos. 17 (1915), 28 (1927), 41 (1935)).

It was perhaps in reaction to the perceived liberal nature of these reforms that the retrogressive step of specifying in the law the Maliki right of a father or marriage guardian alone to contract a woman in marriage (Circular no. 35 (1933)) was taken. This may well have been a step to enforce existing patterns of family and class endogamy by giving the father control in marriage in the wake of an increasingly urbanized and heterogeneous society. At about the same time (1932) the law regulating the custody of children was liberalized, using the Maliki interpretation over the Hanafi, whereby a divorced wife, with good cause shown, could retain the custody of her children until puberty for a boy and the time of marriage for a girl.

The Sudanese Women's Movement

The Women's Movement in the Sudan, with nearly a forty-year history in the modern political life of the country, has had an influential role to play in affecting and even directing social change as it affects the status of women. The major impetus for the growth of this movement was in fact a direct reaction to the presence of the Western, British colonial power in the Sudan.

The first group of politically organized women emerged from the Communist Party which itself had been active since the end of the Second World War in the cause of Sudanese national independence. The party was formed in 1946 and was the first political party in the Sudan to open its membership to both women and men and to establish the emancipation of women as one of its goals. In that same year the Women's League was formed and its membership grew from its original base of educated women to include working women and peasants. The core of educated women was Omdurman Secondary School students who had been expelled for instigating anti-colonialist demonstrations.

In 1951 the Sudanese Women's Union was formed as the successor to the Women's League and it began to assume the leadership for which

the name of the SWU became famous during critical periods in recent history. In 1955, one year before Sudan's independence, the magazine *Sot al-Mara*, 'the Woman's Voice', was first published with a strong anti-colonialist (for Sudan and Africa) and a socially progressive editorial policy. In the early 1950s the Women's Union had a major impact on the organization of trade unions among professions with large female populations such as the Government Elementary School Teachers and the Nurses' Trade Union. They also began to agitate against certain aspects of the Shari'a law, singling out the divorce law, the obedience law and polygyny, for reform. They thus represented the first organized, wholly indigenous voice for change in the law.

It is difficult to express the impact, both positive and negative, that these politically active Muslim women had on northern Sudanese society in the cities. They were outspoken, they were controversial, they were something entirely new, and to be sure many people opposed their actions as well as their words. Their participation in the popular October 1964 Revolution which overthrew the Abboud military regime was heroic and legendary and the most concrete result for women was the extension of universal suffrage in the Sudan, a civil right neither the colonial nor the first post-independence regimes had extended to women.⁴ Another result of the growing political involvement of women was the election of a woman to Parliament, in the aftermath of the 1964 revolution, Fatma Ahmen Ibrahim, one of the founders of the Women's Union and an active communist, so her entrance to the Parliament was controversial on two counts.

It was in this historical context of the rising political involvement of women, first on the independence question and then on the need to improve women's status, that the law itself began to respond to the social upheaval and to change. While the Women's Union was careful not to directly criticize the Shari'a or the 'ulama or other members of the religious establishment, they did raise issues and initiate debate on topics related to the status of women in the law. The question of marriage guardianship (*al-wilaya fi zowaj*), which under existing Maliki rules denied the right of a woman to contract her own marriage, was a target of their concern and was raised in the media and in their own magazine. Many of the Shari'a judges will admit today that it was the pressure from the Women's Union which resulted in the issuing of the historic Judicial Circular no. 54 (1960) which stood in contrast to Sudanese tradition by stating a legal preference for the Hanafi right of a woman to contract herself in marriage instead of affirming the Maliki law on this point. The force of this reform was such that dialogue, debate and legislation clarifying what was meant in the Circular continued well into the

decade of the seventies with discussion of the role of the marriage and how it is to be interpreted in the Sudan.

The question of *bayt eta'a* (house obedience), long the subject of resistance by women who, by leaving their husband's house, forced their husbands to seek repeated obedience rulings from the Shari'a courts, underwent basic reform. The Women's Union had pointed to the injustice and repressive character of police-enforced obedience of wives on numerous occasions. When the Free Officers, led by Jaafar Mohammed Numieri, seized power in a military coup in 1969 with the support of many progressive groups including the Communist Party and the Women's Union, the ground was already prepared for the reforms which were to be instituted by the young regime in its early days. One of the first acts regarding women by the new Minister of Justice, Babiker Awadalla, was to abolish *bayt eta'a*, and the element of police force in it.

During its early progressive period, the Numieri regime also amended the application of Shari'a law regarding *nafaga* (maintenance), increasing the amount to one-quarter of a man's salary and underlining the government's power to enforce the payment of *nafaga* by deducting the ordered amount from the former husband's salary. At the same time the reforms extended into the secular areas of putting into the law provisions for equal pay for equal work and extended periods of maternity leave for working women. These latter reforms affected the seven per cent, approximately, of women who work for wages outside the home in the Sudan, while the *bayt eta'a* and *nafaga* reforms affected all Muslim women; as such their impact was greater. The reforms were popularly received and the Women's Union organized demonstrations in support of the government's actions favorable to the status of women.

The Shari'a establishment certainly suffered a blow to its autonomy with these actions, however the reforms were accepted and applied in the courts. The Shari'a having no organized means of opposing the government, relegated as it is to a section of the Judiciary, kept its silence throughout the turbulent early years of the 'May Revolution' (1969–71). The Shari'a took certain of its own initiatives in response to the upsurge of activity, and in 1970 the first Islamic woman Justice in the contemporary African Muslim world was appointed. This was Sayeda Najua Kemal Farid and thereafter three other women Justices were also appointed in the period until 1974.

1971 marked a political transformation from progressive to conservative with the coup and counter-coup in July of that year organized by left-wing officers in the army to oust Numieri, especially over the issue of his failure to move on the question of the southern Sudan and the 17 year civil war with the north. With the turn to the right came

an end to the liberalization of the laws affecting the status of women and the Women's Union was forced underground because of its opposition to the realignment of the regime after 1971. Thereafter it reorganized as the Sudanese Democratic Women's Union, largely to be distinguished from the Women's Union that became a branch of the Sudanese Socialist Union (SSU), the only legal political party after 1971. The Women's Union (SSU) under the leadership of Nafisa Ahmed al-Amin, a former Deputy Minister of Youth and Social Affairs, achieved its greatest political influence within SSU. To its leader's credit she acted as a spokeswoman and a voice of conscience for the continuation of the upgrading of the status of women and special efforts were directed at programs of utility to working and rural women. Eventually she lost her political posts during a series of purges removing opposition leaders.

In the law, specifically in the Shari'a law, no other reforms occurred as a result of government intervention. Instead the law continued to evolve, as it had since the beginning of the century, through the mechanism of the Judicial Circulars. While the Shari'a moved in the direction of constraining the fullest interpretation of female consent in marriage at the same time it liberalized the interpretation of the law regulating divorce because of cruelty (*talaq-al-darar*) and it introduced the novel concept of *fidya* (negotiated divorce) in cases where there is a strong suspicion of cruelty in the marriage as evidenced by repeated obedience rulings.

Progress during the 1970s has been more the result of the internal development of the Shari'a itself in the Sudan, than of government intervention or the influence of mass activities.

The case of the Sudan does stand as a good example of the force of popular movements for change, here led by women themselves, on society and on the law itself. The political mobilization of women around the question of national independence in the late 1940s and early 1950s and the participation of women in the October 1964 Revolution set the stage for a favorable consideration of reform in the law, both Civil and Shari'a, uplifting the status of women. The groundwork laid by these movements and the overall progressive direction of Sudanese urban society, especially, allowed for the favorable reception of change in the law once instituted. The work already accomplished by the 'ulama and legal practitioners in the Sudan in the early decades of this century also form an historical tradition in the application of the Shari'a which leads in the direction of further reform in the law. In a separate chapter the matter of contemporary movements for reform in the law is discussed. As might be expected, much of the focus of the desired reform deals with the improvement of the status of women in the law.

NOTES

1. The specific categories included legislation to 1974 affecting minimum marriage age, marriage registration, dissolution of marriage, inheritance reform, polygamy regulation, abolition of *talaq*, abolition of polygamy, secular inheritance law, Civil code replacing all religious law (White, 1978: 60).
2. The excision of the clitoris, labia major and minora effecting the 'closing' of the vaginal area.
3. For a fuller discussion see Asma al-Dareer, *Woman, Why Do You Weep? Circumcision and its Consequences*, Zed Press, London, 1982.
4. For a fuller description of this dynamic period see, C. Fluehr-Lobban, 'Agitation for Change in the Sudan' in *Sexual Stratification*, 1977; Fatma Babikar Mahmoud, 'The Role of the Sudanese Women's Movement in Sudanese Politics', 1971, unpublished thesis, University of Khartoum.

CHAPTER FIVE

ISLAMIC MARRIAGE IN THE SUDAN

Marriage in the Muslim Sudan is at the very core of social and religious life. It is expected that every young man and woman will marry and the fulfillment of the marital union is seen in the production of children. Marriage is still very much the binding of two families which are seeking unity between them. First cousin marriage (to *bint'amm* or *fabrda*) is widely preferred.

Perhaps in no other area of Islamic law are local custom and legal tenet so intertwined as with the practice of Muslim marriage in the Sudan. The legal requirements are relatively simple, yet the ritual and celebration associated with the signing of the marriage contract (*al-'agid*) and the wedding itself (*al-zowaj*) are so elaborately combined that one may be confused with the other.

Marriage (*al-nikah*) in Islamic law means embracing or bonding, and in the legal sense it means both the contract of marriage and the subsequent cohabitation. According to the Hanafi school the marriage contract implies the right of a man to enjoy a woman who is not otherwise deterred from marrying by any legal obstacle (Sh. Abdul Kadir Mekkawi, 1899: 204). The legal obstacles to marriage consist of the following: (1) familial relationship – marriage with paternal and maternal aunts is forbidden but with their daughters is allowed, and all lineal kin are forbidden; (2) fosterage – two who have suckled from one breast become as sister and brother to each other and are thus forbidden; (3) affinity – marriage to a woman renders her female lineal kin illicit as marriage partners; (4) marriage to two sisters or to two closely related women is illegal. Temporary impediments to marriage include collateral affinity, the *'idda* period, prior repudiation, difference of religion, performance of the pilgrimage, polygamy and servile status. Marriage to a non-Muslim woman 'of the Book' (*kitabiyya*) is entirely possible, however it is not allowed for a Muslim woman to marry a non-Muslim man.

Marriage is promoted in Islam to make lawful the cohabitation of man and woman and to produce children. The marriage contract

(*al-'agid*), which will be discussed in more detail later, specifically outlines the rights and responsibilities of the husband and wife; in brief these include obedience and conjugal rights owed to the husband by the wife and the payment of dower (*mahr*) and maintenance of the wife and children by the husband.

The essential requirements for a valid Muslim marriage in the Sudan are (1) consent of the wife, (2) consent of the legal guardian – *al-wali*, (3) two legal witnesses, and (4) payment of the dower or *mahr*. While each of these elements must be present for a valid marriage, there are other features inferred from the Islamic legal texts which combine to make a legitimate, socially respectable marriage, including for example, 'equality of standard in marriage' (*al-kafa'a fi zowaj*). This section will discuss the legal and social aspects of Islamic marriage in the Sudan.

Guardianship and Consent in Marriage

Guardianship in marriage (*al-wilaya fi zowaj*) and its corollary, consent in marriage, have been among the more controversial issues in Islamic law in the Sudan, mainly because of the unique combination of Maliki traditions and Hanafi law. Hanafi law, alone among the various schools of Islamic jurisprudence, recognizes the validity of a marriage based upon the consent of the woman alone. This means that she acts on her own behalf and is not represented by a male marriage guardian (*al-wali*). The Sudan has combined the Hanafi and Maliki precepts by requiring both the consent of the woman and that of her guardian.

Historically the Shari'a jurists have explicitly preferred the Maliki position requiring solely the consent of the guardian who is usually the father, or failing him, a succession of male agnatic kin including the grandfather, the uncle, brother or cousin, or failing these an upright Muslim male or Shari'a judge. The preference for the Maliki law in marriage guardianship was stated in 1933 in Judicial Circular no. 35 and basically formalized Sudanese customary practice. The paternal authority in marriage is a deep Sudanese custom promoted by Maliki traditions which penetrated the Sudan from the Hejaz and West Africa, while the protection of the modesty of women engendered in this practice is also deeply felt. In the Sudan it is thought to be immodest for a woman to speak openly of her desire for marriage.

The Shari'a law on this point was not uniformly accepted and indeed the Sudan was already a changed place when the Circular was issued, having experienced 35 years of colonial rule. There is evidence that the British disapproved of a practice which they regarded as 'forced marriage' and there are cases from the period of women fleeing husbands

not of their choice or liking and being returned with court and police intervention.

The judicial interpretation that Maliki law would be followed in matters of guardianship in marriage is contained within Judicial Circular no. 35. Section 1 of the Circular states that a marriage is not valid in the Sudan unless the contract was concluded by the woman's guardian or his agent. Section 3 states that a father who is rational and fully competent from the legal standpoint may marry his virgin daughter up to the age of 33 years without her consent, except in the instance where the father has expressly relinquished this right, as stipulated in section 6. Section 7 gives the guardian the right of compulsory marriage (*mujbar*) even for a non-virgin (presumably previously married) in order that she be protected from loose morals. The essential requirements of the marriage guardian are established in the Circular as being male, Muslim and mentally competent. Guardianship, which most often is the duty of the father, will fall to a succession of close male agnates and, failing these, a Shari'a judge or adult Muslim male may act in this capacity. All of these rules regulating marriage guardianship are taken from the Maliki school and are generally considered to be more harsh in enlightened Sudanese opinion than the Hanafi precepts which permit compulsory marriage only for the insane and for minor daughters.

The law once applied was opposed, often bitterly opposed, by segments of Sudanese society and especially after the birth of the women's movement as the nationalist movement gained momentum, reform of the law regarding compulsory marriage became a conspicuous item on the agenda for change.

After the Second World War, a growing voice of educated and patriotic women was added to the general call for a free and independent nation of Sudan. In the context of mobilization around these issues, the women's movement was able to exert some influence in having the law changed from the Maliki provision regarding marriage guardianship to the Hanafi, or at least a compromise between the two views was developed.

In 1960 Sheikh Mahjoub Osman, Grand Qadi of the Sudan, issued Judicial Circular no. 54 which repealed Circular no. 35, which contained the more conservative provision inspired by Maliki law. In Circular no. 54 it is stated that:

a woman should be married by her permission and with her consent to the husband and to the amount of the *mahr*. Testimony about her adult status should be accepted unless otherwise proven that she is not. If she is a virgin, her silence should be recognized as consent. And it should not be accepted from a virgin that she is

not aware that silence means consent. It is not acceptable at a later time for her to raise a claim that she did not know that silence is consent, unless she is recognized as mentally incompetent.

But if the name of the husband and the amount of the *mahr* are indicated to her and she refuses them (before the date of the marriage contract) and she shows by her actions that she is not accepting them, for example, by her reluctance without expressly saying so, then the contract should be withdrawn. If the female is not a virgin, her silence is not enough and she should state clearly her consent to the husband and the *mahr*.

(Fluehr-Lobban, 1983: 130)

As a result of the reform brought by Circular no. 54, marriage in the Muslim Sudan today is usually carried out with the bride's consent, her marriage guardian acting on her behalf. Agents of the bride and groom (the *wali* for the bride and the *wakil* or agent of the groom, usually the father or paternal uncle) appear at the '*agid* or contract signing ceremony. A legal official, the *maa'zun* (registrar of marriages and divorces) or a Shari'a judge may be present, but not necessarily so; all that is necessary is for two full witnesses (two upright Muslim men or one man and two women) to be present at the contract signing. In the *qassima* (marriage contract) are stated the names of the bride and groom and their agents, the amount of the *mahr* (dower) agreed to by the parties and the separate amounts of the prompt and deferred payments and any terms of marriage to which the parties have agreed provided that they do not contradict the legal tenets of Islam. The couple may agree to keep a monogamous marriage and this is legal and binding, or they may agree to certain housing or financial arrangements. The couple or their agents will only appear in court for the '*agid* if there is some problem, i.e. the bride is going against her father's choice of a marriage partner, or some irregularity, such as the bride being Christian or of another nationality.

The '*agid* ceremony itself is simple and usually predates by some months or even a year or more the actual marriage festivities which proceed according to local Sudanese custom and may last up to seven days culminating in the consummation of the marriage. According to the reform of Circular no.54, if the virgin bride resists verbally or shows by her actions that she is unwilling to enter into marriage with the man, the marriage contract should be withdrawn. Recognized actions indicating lack of consent include a lack of interest or disdain for the marriage preparations, refusal to be removed to her husband's house or to consummate the marriage. It should be noted that a virgin Muslim woman of marriageable age is supposed to be shy and obedient, so

outright rejection in an expressly stated manner may be considered objectionable or unfeminine behavior. Moreover the young woman before marriage is typically in her parents' house and under the general authority of her father or her male guardian. It is very difficult for the traditional woman openly to refuse a marriage which has been arranged for her. Even the adult virgin who may have completed university education and is working professionally will still be under the roof and protection of her family's house. I know of no cases where an adult, unmarried woman is residing alone, in an apartment for example; female migrants to the city will reside with family relations. Even the divorced or widowed woman will tend to return to her family's house unless she is capable of supporting herself. The phenomenon of single women living alone or with other women is quite rare at the moment in the Muslim Sudan; the potential shame and dishonor risked by such an arrangement is simply too great.

However, the law does protect women whose marriage guardians have contracted a marriage for them without their knowledge. In such cases where the marriage may have been arranged in her absence or at some distance from her home while her guardian was away, it is essential that the frank consent of the adult virgin be given by an act which unequivocally indicates her approval, for example, enabling the husband to consummate the marriage, moving to the husband's house or demanding her rights in *mahr* and support (*nafaqa*).

Compelled or forced marriage as a legal practice is outside of the interpretative boundaries of Hanafi law. Technically only a grandfather has the right to marry his granddaughter against her will and he may exercise the same right for a grandson; in such cases he is acting as the *wali mujbar* (compulsory guardian). I personally know of no such cases in the Sudan. Further, according to Hanafi law, any blood relative has the right to marry an under-age female without her consent; however in such cases the girl, upon coming of age, has the right of option (*khiyar al-bulugh*) to demand a divorce claiming an invalid marriage (*faskh nikah*) has taken place (*Encyclopedia of Islam*, p. 447).

In the Sudan forced marriage and the marriage of under-age females is rare and, at least in the urban areas, cases of women who are rejecting their father's or their guardian's wishes in marriage are becoming more common. Since the consent of the female has been clarified in the specific interpretation of Hanafi law in the Sudan, women who have unsuccessfully sought the approval of their guardian to a marriage of their choosing will take the matter to the Shari'a judge who may act as guardian for the woman and accept the marriage. Such cases are painful in that they usually involve the breaking of social ties, temporarily at least, between the woman and her family, yet the Hanafi principle of

the right of consent for women is defended over the more conservative Maliki view.

Consent in marriage is thus a very important issue in the contracting of a valid marriage in the Sudan. Indeed the claim of a lack of consent is a recognized ground for divorce, so the matter should be clear at the outset of the discussion and preparation for marriage. Legal witnesses, who are usually relatives of the bride and groom, will observe the giving of consent and other contractual provisions including the amount of the *mahr* or dower.

Mahr

In addition to settling the question of consent, a Muslim marriage is likewise not valid without the payment of the dower to the bride. Most commonly today, payment is in the form of cash, but valuables in property, land, animals or income-bearing trees are acceptable as *mahr* (Circular no. 29 (1927)). *Mahr* is the primary, essential requirement of marriage. Negotiations regarding the amount of the *mahr* usually take place between the father of the groom or his agent (*wakil*) and the marriage guardian of the bride (*wali*) or the bride herself, if she is not a virgin.

The terms *mahr* and *sadag* are synonymous and signify successful negotiation of the marriage and are payable at the time of the '*agid*' or before the consummation of the marriage. In pre-Islamic times in Arabia, the custom of paying bridewealth by the husband's kin to the family of the wife was practiced. Islam reformed this practice in favor of women making the dower payment a legal debt owed by the husband to the wife, thus *mahr* is *not* the traditional brideprice in anthropological terms. In legal terms the payment is made in prompt (*mu'ajjal*) and deferred (*mu'ajjal*) *mahr*, the total sum being negotiated before the signing of the marriage contract. Usually the smaller amount is paid promptly at the '*agid*' or on the consummation of the marriage, while the larger sum is deferred to the time of the termination of the marriage through divorce or the death of the husband. Without receipt of the prompt payment, the wife may legitimately refuse her husband sexual access. The larger deferred payment is widely recognized as a deterrent to divorce by the husband, who has the right of repudiation. The husband and the wife may agree to increase or reduce the amount of the *mahr* at a later date, if they have the document stating the terms of their agreement recognized in court. In case of the death of the husband, the deferred payment is taken from the estate of the husband. Often in marriage, where genuine bonds of affection develop between the husband and wife, the wife may waive all or part of the deferred

dower, or the husband in such a marriage may give parts of the deferred payment to the wife on the occasions of the birth of children. The statute of limitations for all cases in the Shari'a courts in the Sudan is 15 years, so if a wife wishes to raise a claim against her husband regarding a disagreement as to the amount or payment of *mahr* she must do so within 15 years of the marriage contract.

The amount of the *mahr* negotiated between the families has become the subject of some controversy recently. With escalating costs and inflation, the cost of contracting a marriage too has risen sharply. In 1970, when I first began fieldwork in the Sudan, *mahr* payments of £2–400 for a family of moderate means were typical. Only a decade later in 1979–80, when research for this project was carried out, it was not uncommon to hear of *mahr* payments for the same middle income family to exceed £1000 or £1500. And for the steadily growing petty bourgeois and upper class, payments of £10,000–25,000 in dower costs are becoming the norm with elaborate wedding parties, often the subject of much gossiping in the three towns. A popular song in the Sudan in the 1970s hailed the good fortune of a girl whose bridegroom had worked in one of the Arabian Gulf countries and would therefore bring fine clothes and gifts as well as a high salary with which to pay the prompt dower (Sudanow, February 1979).

While *sadag* or *mahr* is an essential feature of marriage, no legal maximum has been set by any one of the schools of Islamic law; however the Hanafi school does set a legal minimum at one dinar or 10 dirhams, both obsolete denominations (Levy, 1969: 114). I was quoted a legal minimum of ¼ dinar or 50 piastres by the Sudanese Grand Qadi, Sheikh Mohammed al-Gizouli. More importantly, the 'ulama favor a reduction in these escalating dower costs and have criticized the excesses of the middle and upper income groups with respect to *mahr*. Certain unorthodox, reformist groups, like the Republican Brotherhood (*Al-Jamhuriyyea*) in the Sudan advocate a token *mahr* of £1.00 to be paid at the time of the marriage contract. While there is a great deal of complaining about the soaring *mahr* costs, there is little organized resistance to it beyond the Republican Brotherhood movement, for to demand less for a daughter would bring a certain sense of shame to the family, implying her lack of worthiness.

Although the dower payment legally belongs to the wife, there is the widespread custom in the Sudan for the virgin bride to offer the prompt payment to her father to help defray the costs of the wedding that the bride's family incurs. The *sheila* (the basic commodities needed for setting up the household) are provided by the groom as well as certain wedding gifts for the bride, including gold jewelry, while the bride's family will usually provide the couple with their bedroom suite, the

kitchen utensils and cover the costs of the wedding party (*haflat al-'eris*). The deferred payment is legally and customarily the wife's property.

Customarily the deferred payment is larger than the prompt one. In many respects the public announcement of the amount of the *mahr* is as important as the actual receipt of the dower in cash or in property. The prompt and deferred sums of the *mahr* are announced at the '*agid*' marriage ceremony and attest to the fact that there is 'sufficiency' (*kafa'a*) in the social sense, between the bride and groom. In the most precise interpretation of the law the groom must be adequate or sufficient to the social standing of the bride, her father and her family; otherwise the marriage could be viewed as imperfect or irregular, formally in the law and informally in society. One interesting case involving some alleged deception between the announced and actual amount of the dower and the subsequent question of the validity of the marriage was heard before the Shari'a Supreme Court in 1968. A summary of its essential features is as follows:

The husband—plaintiff came to Omdurman Shari'a court requesting an obedience order (*hokum eta'a*) for his wife to take up residence in a house he had prepared for her in the Banat section of Omdurman. The agent of the wife in court (her father) claimed the prompt dower had not been paid and he requested the court to dismiss the case.

The husband was not able to prove with witnesses that he had paid the prompt dower nor that he had prepared a good house for her (i.e. one in a good location with decent neighbors).

The court at this level did not apprise the plaintiff—husband of his right to swear by oath that his statement was true and the case was dismissed.

The husband appealed the case to the Omdurman High Court which decided in his favor because of the procedural error. The husband then testified that he and the father had agreed to £S51.00 *mahr* but that they had requested the Sayyid who performed the marriage contract to announce that the dower was £S60 (£S30 prompt, £S30 deferred) even though they had agreed to the £S51.00 dower. This the father requested so that people would not say that he married his daughter without an adequate dower. Again the court dismissed the case and the husband brought the case before the Shari'a Supreme Court which decided that a number of procedural errors had taken place whereby the question of the secret and announced dowers was not fully investigated in the lower courts. The case should thus be initiated again and heard afresh before the lower courts.

(Shari'a Supreme Court, Tamyez Decision No. 152/968)
 Hon. Sh. Abdel Maggid Abu Gussaisa (Pres.) and Hon.
 Sh. Ahmed Mohammed Ahmed and Hon. Sh. Ahmed
 Omar Mohammed presiding.)

The case ultimately devolved to a question of procedure, but the facts revealed illustrate the important social function of the *mahr* to show before all the neighbors and relatives assembled for the contract signing ceremony that an adequate marriage has been negotiated. Satisfying this public requirement seemed to be sufficient for the father and marriage guardian of the woman. An unanswered question is whether the bride, on receipt of or learning of the £S51.00 dower, then refused to cohabit with the husband or whether the bride or her father refused the house which the husband had prepared for their married life. In short, the role of the woman, with her father acting as her agent, is unclear. It is sure that there was some conflict over whether the house provided met the Shari'a requirement of a good house in accordance with the woman's social standing.

Property Rights Conveyed through Marriage

Muslim marriage does not convey any community of property between the husband and the wife, as lineal relations are generally favored over affinal ties in Islamic society. Throughout a marriage a husband retains full possession and control of his property as the wife does of hers, including her dower, her gold and other jewelry received as gifts from her husband, and any sum she inherits or earns.

However the husband and wife do have mutual rights of inheritance; if there are no children, he takes half and she takes a quarter of the estate; if there are children, he takes a quarter and she takes one eighth. In the Sudan the law has been modified so that if there are no other prescribed heirs living upon the death of a spouse, the living husband or wife inherits the entire estate, instead of the half or quarter which would otherwise be taken and the remainder absorbed by the State Treasury (*Bayt al-Mal*) (Judicial Circular no. 26, 1925). The other rules of inheritance will be taken up in a succeeding chapter.

Al 'Agid' – the Contract Signing Ceremony

The marriage negotiations completed, the formal and public recognition of the marriage takes place at the '*agid*' ceremony. Although this celebration has been compared by some Western observers to an engagement party, it is in fact the true, legal marriage. Consummation

of the marriage may not take place for months, even a year or more, but the legal marriage with many of its accompanying privileges and responsibilities begins at the contract signing ceremony. The husband and the wife determine the length of time to elapse between the '*agid*' and the time of cohabitation, and any child born to the woman is legally the husband's, and if the husband dies before cohabitation the wife is legally entitled to maintenance. Mutual rights of inheritance are established six months after the date of the '*agid*'.

The '*agid*' is always held at the house of the bride, and the bride and groom, while present, do not speak for themselves. Rather they are represented by the woman's guardian (*al-wali*) and the man's agent (*wakil*), usually the fathers of both or close male relatives.

While the assembled guests and relatives have settled themselves into the female and male sections of the house, the spokesmen for the bride and groom initiate the business of formalizing the contract of marriage (*al-qassima*). The names of the bride and groom, her guardian and his agent and the two legally required witnesses are all listed on the form. The amount of the *mahr*, in two payments, prompt and deferred, is indicated. The contract signing with the relevant information is noted by the *maa'zun* who keeps a record of marriages and divorces in a particular locale or judicial district. Copies of the contract are given to the *maa'zun*, the bride's guardian and the husband. A Shari'a judge may also be present at the '*agid*' ceremony to say some words about the meaning and purpose of marriage in Islam; however, neither the judge nor the *maa'zun* is legally required to be present, only the marriage witnesses.

Once this simple ceremony is over, there is singing and dancing by the bride in the women's quarters and the cries of joy from the women, the *zagharat*, can be heard to announce that a marriage has taken place. The men congratulate the groom and his relations with the familiar '*mabrouk*' and the consumption of soft drinks and sweets are a part of the customary festivities. '*Agid*' celebrations are often held on Thursday nights before the religious, non-working day of Friday.

'Isma in Islamic Marriage

'Isma is a complicated concept in Muslim marriage that is not readily translatable in a word or phrase, but rather by example. '*Isma* is a responsibility that is invested in the man and begins with the marriage contract. The wife is placed under his protection or guidance, in his '*isma*'. While the marriage is holding good it is correct for the husband to say of his wife, 'She is in my '*isma*'. And if the husband wishes to terminate the marriage contract, one of the formulas of repudiation

is '*khalas ismati*' or '*kharget ismati*' – 'she is finished' or 'she is out of my '*isma*'.

The responsibility of the husband to keep his wife chaste and to keep her morality intact by satisfying her needs is an important reason why she is in his '*isma*'. The charge of maintaining marital fidelity is part of the husband's responsibility conferred at the time of marriage, part of '*isma*' in the marriage.

In court a wife may state that she is cohabiting with her husband by saying that she is still in his '*isma*', or she may complain that she is suffering while under his '*isma*' and wants to be free of the marriage contract.

Customary Sudanese Marriage

The legal marriage which is simply conducted in the '*agid*' ceremony stands quite separate from the various forms of customary marriage found throughout the Muslim Sudan. The marriage celebrations with which I am most familiar are those of the northern, riverain peoples, most particularly those who have settled in the three towns and have, over time, formed a common culture.

With respect to the northern, urbanized Muslim families, the festivities surrounding customary marriage occur over a three to seven day period and are marked by a round of activities and rituals which culminate in *al-lailat al-dukhla* (night of the entrance), the first night that the bride and groom spend together.² With rising costs, the elaborate seven day celebration (which traditionally could extend to 40 days of feasting and hosting relatives) is often being trimmed to three days of more intense activity with separate activities at the house of the bride (*al-'arus*) and the groom (*al-'aris*).

As recently as a generation ago, it was not uncommon for girls to be married at or before the age of puberty. The marriage of younger girls was strictly curtailed by the colonial government and husbands who had married pre-pubescent girls were constrained from attempting sexual relations with them or they could face the potential of a criminal charge of rape (Fluehr-Lobban, 1973). The ideal marriageable age for women has increased to the later teenage years, and for middle class women, until after secondary or post-secondary schooling. The age of the man is typically higher, his marriage being delayed by the high costs of marriage which he must assume including the *mahr*, and it is not uncommon for the bridegroom to be in his thirties while the bride is in her late teens. Typically the man is ten to 15 years older than the woman and this represents the ideal norm.

The traditional marriage celebration over three days encompasses

the procession of the bridegroom, with his relations and friends, to the house of the bride, the night when henna is applied to the groom's hand (*lailat al-henna*) and possibly a foot (henna may also be applied to close friends of the groom and the henna, which will remain on the finger-nails until the nail has grown out, is the mark of the recently married man), and finally the conjugal night (*lailat al-dukhla*). Each day and night is accompanied by feasting, singing and the playing of the *dalluka* drum by the women for the bride and her friends to dance. The singing and dancing may be performed only in the *hareem* by women and for women, or it may be performed publicly as well before the assembled guests where a band and professional singer have been employed. The lovely 'dove dance' (*raz al-hammama*) is danced first by the married women thrusting the shoulders back and moving the head slowly from side to side emulating the graceful movements of the dove. Unmarried girls may follow or join the married women and this provides a socially acceptable milieu for them to display their charms to the bachelors in attendance. Such dancing is often encouraged by men who will snap their fingers in a gesture of approval and the woman will acknowledge this attention by turning her head in the dance so that her long braided hair will fall and brush the clothing of the admiring man. The 'dove dance' is at once sensual, yet graceful and dignified, and together with other ceremonial elements of the Sudanese weddings comprise the essence of Northern Sudanese folklore. Weddings are a great focus of cultural attention, much planned for and long-remembered, and they carry with them crucial cultural symbols which bind families and social groups unlike any other ritual in Muslim Sudanese life. From the point of view of the society the essence of the wedding is cultural and ethnic rather than strictly legal.

After the marriage, there is a tendency among Nubian Muslims for the couple to establish matrilocal residence, with the bride's family, for a period of time which is held to be no less than a week, more often 40 days, but the residence can extend up to a year or more until the birth of the first child. This is generally considered to be a vestige of matrilinear social organization prevalent among the Nubian groups until the penetration of Islam after the fifteenth century. After this time the couple may shift to the man's family compound or to a house of their own, a distinct preference of young couples today, although the separate house is ideally situated close to relatives. From the point of view of the law, it is interesting to note that a legal house is defined as one which stands not separated and isolated, but close to the houses of neighbors and relatives (Sh. Abdel Kadir bin Mekkawi, 1899: 188).

Pregnancy is expected to occur within the first year and the woman traditionally gives birth at home assisted by a midwife (*daya*) and her

female relations. The new mother rests for 40 days after the birth, after which visitors are welcomed and are treated to sweets as they greet the new mother and baby.

With respect to marriage any custom which is not contrary to the teachings of Islam is permissible, and thus there is wide variety in the practice of customary marriage throughout the culturally diverse Muslim Sudan and in the Islamic world in general. For example, some traditional families in the Sudan use charms and amulets (*hijab*) to ensure the success of the marriage and fertility for the couple, while others spurn such practices and prefer the trappings of a more 'modern' wedding with the groom in a Western suit and the bride in a white dress posed for the formal wedding portrait. Both are acceptable in Islam and the religion is neutral (the category of thousands of acceptable things called *jaiz*) regarding such differences in social practice.

Ta'a and Nafaqa (Obedience and Maintenance)

The marriage contract entwines the husband and wife in a set of mutual rights and obligations. The most fundamental of these is the responsibility of the husband to maintain the wife, while the wife has the duty to cohabit in the house with the husband under his protection, his *'isma*. Failure of the husband to properly maintain the wife or departure of the wife from the husband's house constitutes a breach of the marriage contract and is sufficient grounds for the injured party to seek judicial relief in the Shari'a court. Conjugal rights are mutual and there is nothing in the law which sanctions unilateral sexual privileges by the husband or the wife. Property does not become jointly owned in Muslim marriage, so there is no division of property at the dissolution of a marriage through divorce or death; however, a husband and wife do have mutual rights of inheritance. The custody of children is the first right of the mother until prescribed ages, while the father is bound to maintain them as he is bound to maintain his wife.

Traditionally the majority of marriages were arranged, so the notion of romantic love, though idealized in poetry and song, is rarely a primary feature of the marriage although truly loving bonds may well develop in the course of a marriage. Increasingly today both men and women are demanding the right to make their own choice of a marriage partner, someone they have met at the university or at the workplace, and as long as the choice is within socially acceptable boundaries families are increasingly agreeing to this.

From the strictly legal point of view, the essence of the marriage contract consists in the maintenance of the wife by the husband in exchange for her obedience, thus the association between *nafaqa* and

ta'a, support and cohabitation. The two are treated together here because in Maliki law, which is essentially followed in the Sudan on these matters, the wife is not entitled to maintenance unless she is cohabiting with the husband.

Nafaqa

Nafaqa encompasses food, clothing and lodging and is a primary duty of the husband to the wife and children. Priority is given to the wife who is the 'root' (*asl*), while the children are the 'branches' (*far'*) (Asaf A. A. Fyze, 1949: 203). The husband's responsibility to maintain his wife begins at the time of the marriage contract. *Nafaqa* is due to the wife whether she is Muslim or not, rich or poor, and whether or not the marriage has been consummated. Although this latter point is legally binding, in practice maintenance does not customarily begin until the couple begin to cohabit, which may be some time after the signing of the marriage contract. *Nafaqa* is in a sense popularly understood to be the price of legal sexual access to the wife. Thus the wife is entitled to maintenance as long as she remains in the house of her husband, or, if they are living in her house or the house of her family, as long as she permits him to cohabit with him (Sh. Abdel Kadir bin Mekkawi, 1899: 176).

The law regarding *nafaqa* in marriage (and there are other forms of *nafaqa* to be discussed later) is quite elaborate and in these current times of economic stress *nafaqa* cases have become the most common type of case heard before the Shari'a courts in the three towns. For example, the husband is bound to maintain the wife according to the standard of living she was accustomed to in her father's house, unless she voluntarily relinquishes this right at the time of the marriage contract. If she had servants in the consanguinal home, the husband is bound to provide them in the affinal home. Her standard of clothing and housing before marriage should be kept after marriage. Usually this presents no problem that the courts would see because the larger principles, of marrying endogamously (*fabrda*) and at the same social standard (*al-kafa'a*), a sort of class endogamy, are very much in effect in the Sudan today.

Although household sharing within an extended family pattern is still very common in the urban areas (and more so in the rural areas), the law obliges a husband to lodge his wife in a separate house if she is not willing to live with his family. Moreover for the small number of men who are practicing polygyny,³ the law states clearly that each wife must be installed in a separate and adequate house, if this is her desire. An interesting legal point of sociological note, as mentioned earlier,

is that a proper house is defined as one which is not in a solitary location – ‘a house which has no neighbors is not a legal house’ (ibid., p. 188).

In the contemporary Sudan the pressing economic problems of low per capita income, rising costs and shortages of basic commodities combined with periodic political instability have resulted in a major migration of Sudanese men and a small number of women to the Arabian peninsula, the Gulf and more lucrative parts of North Africa, including Libya, where they are attracted by higher salaries and the greater availability of consumer goods in the market. Consequently, large numbers of married women are left behind in the Sudan, sometimes without support for themselves or their children. A very typical case would be the following which I observed in Khartoum Shari‘a Court in 1979.

A young woman came to court from Kosti in south central Sudan with an order from the Shari‘a court there to seize the property owned by her husband and held by a relative in Khartoum. The property, seized with the assistance of the police, amounted to a cassette recorder, a polaroid camera, a short-wave radio and some clothes, and was brought to the court to have its value assessed in order that it be sold by court to provide *nafaqa* for the wife. The husband is working in Saudi Arabia and has not been sending her money despite repeated attempts through the court to have support payments sent to her.

The woman has brought witnesses to show that the property indeed belongs to the husband. A policeman from the court is present as the goods are enumerated and evaluated. At a future date, after the sale of the items, the woman will collect her *nafaqa* through the court.

(Observed 13 December 1979, Khartoum Second Class Shari‘a Court, Judge Mohammed Mustafa presiding)

In this case and others of its type, the repeated attempts by the wife to obtain maintenance from the husband may finally result in the woman applying to the court for divorce on the ground of non-support, a judicial ground for divorce which is becoming increasingly common in the urban courts and is recognized as a growing social problem by legal professionals. It is the feeling among some judges that to allow a woman to go for a long period (for example, over six months) without sufficient means of support will place the woman’s morality in jeopardy, in that she may be tempted to find the needed support through illicit sexual relations. As one judge put it, ‘Our function is to protect the community from corruption’.

Nafaqa is also owed to the children of a valid marriage, and some

women choose to raise a claim solely for the support of the children, *nafaqat al-atfal*, as in the following case:

A woman with four children applied to the court for their support from her husband to whom she is still married and with whom she is cohabiting. The problem is that the husband-father squanders his money on drinking and does not leave enough money to feed and clothe his children adequately. The husband has also come to court and he does not contest the wife's allegations and he agrees to the sum that she is requesting, £S30.00 a month. In fact he is a bit intoxicated and the judge threatens to imprison him for insulting the court in this way. The judge decides that *nafaqa* should be paid in this case since the law does not disallow such payment to a married woman, especially if the husband agrees to it. The judge issued the order which would be processed through the Judiciary which in turn would contact the place of work of the husband and take the £S30.00 monthly from his salary.

(Observed in Khartoum Shari'a Court, Second Class,
3 January 1980)

Nafaqa, which has been compared incorrectly with alimony after divorce in the West, is in fact much broader in scope, and in marriage it encompasses the right of the woman to economic security while she is within the bounds of legal marriage. There are no rights to *nafaqa* for a woman cohabiting with a man without benefit of marriage and there is no such notion as 'common law marriage' in Islam. The rights of a woman to *nafaqa* upon the dissolution of the marriage through repudiation or judicial divorce will be discussed in the chapter on divorce, while other interpretations of the larger meaning of *nafaqa* will be discussed separately.

Consistent with the attention to detail in the applied law, *nafaqa* encompasses clothing, food and housing, but might not include, for example, medicine which the wife may need. The cost of medicine should come from the wife's property, according to Hanafi law, unless the husband voluntarily provides it or the wife's income is not sufficient to the need, in which case he is morally bound to provide it (Sh. Abdel Kadir bin Mekkawi, p. 186). The obligation of the husband to provide *nafaqa* ceases upon his death, and while this may seem amusing, his obligation to clear his debt of *mahr*, for example, continues after death.

Ta'a

Ta'a, obedience, is considered here together with *nafaqa* because the primary condition for the wife's legitimate claim to maintenance rests with her obedience in marriage. *Ta'a* is thus not a separate topic in Islamic law, but is discussed only as a condition for maintenance, according to Maliki traditions. Obedience in marriage is narrowly defined as remaining in the same house with the husband after the consummation of the marriage. The house must be a good house and adequate to the standard of the woman according to the Shari'a. The woman is allowed to visit her family (once a week according to older interpretations, and in fact her freedom to move is interpreted quite liberally in the Sudan). A woman is declared to be disobedient (*nashiz*) only when she has left the house of her husband without his permission and refuses to return. Hanafi law specifically permits a woman to leave her husband's house weekly to visit her family and the husband is legally constrained from preventing her from doing so. If a wife deserts her husband's house, willfully and knowingly, she is denied the right to *nafaqa* entirely.

In legal practice in the Sudan the law regarding *ta'a* has been applied most vigorously in the specialized area called *bayt eta'a*, literally 'obedience to the house'. The law regarding *bayt eta'a* has been an area where fundamental social reform has taken place and it is worthwhile to examine its social history. In the past the Shari'a court had the power to issue an injunction against a woman who was disobedient after the husband proved this with witnesses in court. Once the order went out from the court, the Sudan police would execute the order by returning the woman to her husband by force if necessary. This aspect of the intervention of the police in cases of legal disobedience has been repugnant to women and bitterly opposed by them during the years of its enactment until its reform in 1969. The following case gives ample testimony to the complaints of women at the time of its hearing:

To: Legal Secretary, Sudan Judiciary

From: J. Longe, District Commissioner, Eastern Kordofan

27 February 1936

The Qadi of Um Ruaba sends execution papers concerning an order for obedience which the District Commissioner at Um Ruaba executed three times but without avail. The woman told the D.C. that she is prepared to refund the dowry to her husband and although she was threatened by the D.C. that measures shall be taken to execute the decree by the police, she still refused to go with her husband.

El Obeid 17 June 1936

To: Legal Secretary

An order has been issued against a woman in favor of her husband. The woman persists in refusing to obey or live with her husband in spite of repeated attempts to get her to do so.

Will you please let me know what action is to be taken? The woman and her father complain that the former was beaten by her husband.

From: District Judge,
Kordofan Province

From: Legal Secretary

To: District Judge, Kordofan Province

22 June 1936

It is futile to make further attempts in this matter. Please return the papers to the kadi informing him accordingly.

(From Sudan Law Project files, Faculty of Law, University of Khartoum)

There is a note attached to the foregoing case which gives an excellent insight into the thinking of the Shari'a High Court judges on the matter of obedience in the 1930s. It is from the Legal Secretary and is not dated but presumably is connected closely with the case to which it is attached. It reads:

The Grand Kadi is of the opinion that this Shari'a judgment should be executed three times; then it is a new case and should be treated as such. He raises the whole question of returning the wife 'only three times'. Why should it not be the same as in Egypt? The judgment is executed an indefinite number of times on the same case. Here in Sudan all that happens is that a new case is raised and execution is ordered three more times. Judgment for the handing over of children is carried out an indefinite number of times, so should be judgment on the obedience of a wife. The idea of a Mohammedan woman being returned only three times and then allowed to go free is objectionable.

Certain tensions between the colonial government and the Shari'a legal authorities are evident in the preceding remarks where it is clear that the repeated, forcible return of wives to their husbands is rejected by the British while it is promoted by the Shari'a establishment at the time. During colonial rule certain of the cases which were brought to the attention of the British authorities resulted in some amelioration of obedience rulings being handed down against women, and here we

must point out that the autonomy to which the Shari'a courts were theoretically entitled was undermined. While the result was beneficial to deserting wives, the mode of reform was British-inspired and not Islamic and, to that degree, it was ineffectual in the society at large. One tactic used by women seeking judicial relief was to have the case heard before the civil courts where the criminal abuse of the wife by the husband was alleged. There the Shari'a had no jurisdiction as the following case illustrates:

Judge of the High Court
Northern Province, El Damer
24 Sept., 1940

On 8/2/40 the Shari'a Court of Shendi sent a decree of obedience for execution and on 13/2/40 the wife was handed over to her husband by force.

On 17/8/40 the decree was returned for execution again; the wife was induced to obey her husband by peaceful means, but she refused. The parties went out of court together, but it seems the wife ran away.

On 31/8/40 the decree was returned for the third time and it was impossible to convince the wife to comply with the order.

The husband was then tried in Magistrates' Court, was fined and imprisoned for causing hurt to the wife's father and for beating the wife.

...It was proved in the course of the criminal trial that the wife was badly treated and was frightened by the husband. The wife is a girl of 16 years who has been compelled by the Shari'a court to live with the husband in his house which is already occupied by his second wife and child.

It is true that the girl and her father belong to a lower class at Shendi, but even so this does not justify the handing over of the girl by using undue force (which seems to be the only means of execution of this decree).

The husband is the muezzin of the mosque at Shendi who works under the control of the kadi.

From: District Judge

To: District Judge
From: Legal Secretary

The kadi should be informed that it has proven impossible to execute this decree and no useful purpose will be served by further action.

(From Sudan Law Project files, University of Khartoum,
Faculty of Law)

Sensitivities in this case no doubt ran high due to the position of the husband in the local mosque, on the one hand, and the resolve of the British not to execute an obedience order against the young wife again due to her somewhat pitiable circumstances. Although it is undocumented at this point, an uneasy peace must have existed between the Shari'a officials and the colonial legal officials. The latter's understanding of Islamic law was, no doubt, generally poor, and the autonomy in personal and family matters which the Shari'a enjoyed as its unique field of interest and jurisdiction was perhaps resented by the English when it conflicted with their standard of 'justice, equity and good conscience' which was used to measure non-English law against English law.

After independence the Shari'a along with all other legal institutions was decolonized and *bayt eta'a* was back in full force unimpeded by Western legal norms. The Sudanese women's movement, active throughout the 1950s and 1960s, raised the question of the injustice and abuse of women engendered by *bayt eta'a*. The result was that the component of the use of police force was abolished in 1969 after the 'May Revolution' was proclaimed by Jaafar Mohammed Numieri. This cut into the essence of *bayt eta'a* by removing the element of police force in returning disobedient women. After the reform the Shari'a court only had the right to issue an order for obedience of the wife but was denied any power of enforcement.

It must be said that, independent of direct government intervention, the Shari'a courts were moving in a similar direction. Repetition of orders for obedience hampered the efficiency of the work of the courts and, moreover, their intended effect rarely deterred a wife who was determined to leave her husband. The courts had moved to the pragmatic position that if a wife has repeatedly been ordered to return to her husband without success, and then the wife comes to court raising a case for divorce, the repeated *ta'a* rulings are a circumstance *in favor of* the wife's claim for divorce. Moreover, if the wife proves with witnesses that the house she is living in with her husband is not a good house (i.e. a separate house with courtyard, walls for privacy and in a good community) then she will not be compelled to return. However, if it is shown that she is living in a good house and she refuses to return to it to cohabit with her husband, then she can make no legitimate claim to *nafaqa* at a later date. The following case illustrates the intimate connection between *ta'a* and *nafaqa*, that the observation of the obedience is a necessary condition for receipt of the maintenance:

A rather well-known Sudanese actress came to court seeking past *nafaqa* payments which she claims are due her. About a month earlier she had left her husband's house, apparently the culmination of a long dispute during which time her husband left her for a period of eight months when he did not send her any support from his village in the north where he was residing. When the woman left her husband's house she went immediately to the Shari'a court to register her action. The husband, who is in court with the wife, cannot prove that he supported her during the time he was away. She claims that the matter was discussed with two neutral parties and it was agreed that if she returned to him he would pay her the accumulated *nafaqa* for eight months. He failed to do so and she was forced to come to court to compel him to pay her. Moreover, he has no right to complain of her disobedience since she has the right not to cohabit with him while she is not being maintained by him.

The court decides in her favor and hears witnesses on the same day as to an adequate amount of *nafaqa* to be paid to her and this is set at £S25.00 a month for the eight month period that the husband was away. The wife protests and wants a continuing monthly allowance, but the judge says that the law is clear; until she returns to her husband's house, she cannot claim support payments.

(Observed in Khartoum Second Class Shari'a Court, 2 December 1979)

While maintenance and obedience are entwined, so is the lack of adequate support tied to claims of divorce. The woman in this case said in court that she wanted to get a divorce, which is a separate case, and the judge told me informally that he is inclined to grant a judicial divorce to a woman who has been without support for a prolonged period because of a fear that she may become corrupted in her search for means of support.

Any case involving *ta'a* should be examined carefully by the judge for the underlying cause of the disobedience. *Ta'a* rulings are often a stage on the way to divorce and such cases offer an opportunity for the judge to introduce some mediation into the dispute between husband and wife. In other, more complicated cases (as related to me by Justice Najua Farid), the wife may be used as a pawn in disputes between her family and her husband, such that she would be ordered by her father to leave her husband's house and come home until the husband relents to her family's demands. Any legal rule, it seems, can be manipulated to bring about an effect opposite to that for which it was intended.

In *al-fiqh* (Islamic jurisprudence) theoretically there exists the obligation on the part of the wife to have sexual relations with her husband, but in practice this is non-existent because such a claim by the husband must be proved with witnesses, which in this case is a social impossibility.

The elaborate nature of this discussion of *ta'a* is inconsistent with its position in Islamic jurisprudence. Specifically *bayt eta'a* is absent from mention in the Qur'an and *hadith* and may have penetrated the Sudan and Egypt during Ottoman times. *Ta'a* cases are among the most commonly seen before the Shari'a courts (see Tables 1 & 2, Ch. 3, p. 75) and are indicative of a basic idea of conflict between husbands and wives and an inability of the legal system to find satisfactory and lasting solutions to them. The repetition of the *ta'a* rulings, historically and to a lesser extent contemporarily, is a cardinal feature of the law regarding obedience in practice. The persistence of women to remove themselves from a marriage home which, for them, has become intolerable is the prominent sociological feature of these cases. The more enlightened and sensitive judges respond more to the causes of the disobedience than to its 'cure' through an obedience decree, and will consistently pursue marriage arbitration as an alternative to repeated obedience rulings and perhaps eventual divorce.

Al-Kafa'a fi Zowaj – Adequacy or Equality of Standard in Marriage

Al-kafa'a (adequacy or sufficiency) is discussed in the literature on Islamic law as an aspect of the larger law regulating marriage. It is interpreted to mean equality in religion and social standing between the proposed husband and wife, but such that the wife should be equal to and may be inferior in social standing to the husband, but never the reverse. 'Equality is essential on the part of the man, not on the part of the woman; because a noble man does not disdain to marry a slave woman, while a noble woman disdains to be united with a low born man' (Sh. Abdel Kadir bin Mekkawi, 1899: 256). The Prophet Mohammed is said to have declared that 'none contract women in marriage but their proper guardians, and that they be not so contracted except with their equals, because cohabitation, society and friendship cannot be completely enjoyed except by persons who are each other's equal' (Ameer Ali, 1894: 328). This is a statement in legal precept of the practice of hypergamy which is established practice in many hierarchically organized societies and provides legal support for first cousin marriage and the favoring of endogamous unions in Arab society. *Al-kafa'a* then operates to ensure that certain criteria are met in order to make the marriage partners a 'good match' for each other.

There is some difference of opinion between the Hanafi school and the Maliki school with respect to the criteria employed. The Hanafi jurists state that equality between the husband's and wife's families should exist in religion (i.e. both Muslims), in occupation (the husband's work should not be inferior to that of the wife's father), in family genealogy, in property, in being freeborn and in the absence of defects. In other words, the standard of the family of the woman should be equal to or possibly less than that of the man in religion, social and economic affairs. In a related concept called *Islam al-abu* (of the fathers), it is said that the woman should not be from a longer line or more illustrious family of Muslims than the man's. Likewise the families should be matched or the woman's family may be less than the man's in matters relating to finance, property, work and standard of living. Similarly, there should be equality in that neither family has a background of slavery – or the woman and her family could be inferior in this, i.e. a slave in former times or from a family in which there were slaves. Equality is not necessary in a wife for a husband can raise her to his own standard, but a wife cannot elevate her husband through marriage. *Al-kafa'a* is not so much imposed through the law as maintained through the customary arranging of marriage, and in the Sudan in practice this principle helps to maintain the relatively high rate of endogamy which exists in certain communities.

The Maliki school differs in that it interprets equality to mean in religion *only*, that is the profession of Islam and its religious observance.⁴ Maliki thought on this point is derived from one of the sayings of the Prophet that 'People are equals like the teeth of a comb; no superiority has an Arab over a non-Arab otherwise than by piety' (ibid., p. 256). In the Sudan, since no Judicial Circular has been issued relating to *al-kafa'a* directing Shari'a judges to follow Maliki law, the Hanafi principles apply.

In practice the Hanafi law could be said to be more rigid or less tolerant of marriages across class and ethnic lines. Indeed in the Sudan not only are intra-ethnic marriages still the norm, but some families express preferences for marriage partners from within certain branches (*far'a*) of ethnic groups (*qabilat*). Although both ethnic groups are Muslim and Sudanese by nationality, it is unlikely that a Shayqiyya from the northern Sudan would find adequacy or equality in marriage with a Fur from the western Sudan. There are simply too many differences, that is inequities, in terms of culture, history and even in the practice of Islam.

Nevertheless Sudanese society is changing and expresses a philosophical belief in the equality of all peoples before the law. And in the context of the modern, urbanizing society new relationships, across

traditional ethnic and class lines, are developing at the colleges and universities and at places of work where young men and women are meeting each other outside the confines of family affairs. As a result, notions of the proper standard of equality in marriage are undergoing some stress and change. Law reflects society in large part, and contemporarily ideas about *kafa'a* are changing.⁵ A landmark case regarding *kafa'a* was settled in the Shari'a High Court in 1973 and was widely discussed throughout the legal profession and in the community at large. A summary of this important case is as follows:

The plaintiff is an adult virgin of 24 years who applied to the Khartoum North Shari'a Court asking that the court grant her permission to marry her fiancé, despite her father's objection that he is not *kufu'* to her. She claims her fiancé is equal to her in every respect including religion, genealogy, occupation, freedom and wealth. She asked the court to restrain her father from his threats that he would kill both of them if such a marriage be consummated.

The father, through an advocate, responded to the suit saying that the man his daughter is intending to marry is beneath his family's social standing and has in his background a family history of bondage (the man's grandfather is alleged to have been a slave in a village in the northern Sudan).

The young woman countered that today in the Sudan there is no slavery, all people are free and matters of freedom and genealogy upon which *kafa'a* rests differ from one generation to another and according to changes in people's beliefs. Moreover a defect or deficiency as regards genealogy could be compensated for in the attainment of knowledge, for example. (The young couple are both university graduates.)

Four male relatives of the woman, besides her father, testified that they heard gossip in their local town concerning the slave origins of their relative's fiancé, and that they opposed the marriage.

The woman's first application to court was denied in favor of her guardian's right to withhold his consent to a marriage where the fiancé is not *kufu'* to his daughter.

Through her advocate, the woman appealed the decision to the Province Court on the grounds that Islam favors equality over inequality and the honor of knowledge is above the honor of wealth and genealogy.

The father's advocate replied that the woman had now admitted the bondage in the background of her fiancé and that was proof enough of his not being *kufu'* to her.

The Province Court overturned the lower court's ruling and gave the woman leave to marry her fiancé with a dower equivalent to those of her standing and with a marriage guardian other than her father who would meet the qualifications of marriage guardianship. A significant new element which was brought out by the court in its arguments was that the woman was not living with her father but with her mother and he was not well-acquainted with her situation regarding marriage.

After this court ruling the father agreed to a mediation whereby the daughter would withdraw her appeal to have her father removed as guardian and the marriage would be conducted within three months' time; however the woman rejected this. The court tried to convince the fiancé that to marry into a family which openly rejected him would be a disaster, but he, too, could not be dissuaded.

The father then appealed the Province Court's decision to the Shari'a High Court saying that the lack of *kafa'a* between his daughter and her fiancé invalidated the marriage contract. The woman's advocate responded that Islamic jurisprudence is replete with opinions that *kafa'a* is not a necessary condition for marriage and cited numerous jurists and scholars from the various legal traditions.

The High Court decided the case using Hanafi legal arguments and upheld the ruling of the Province Court on the following grounds:

1. hearsay evidence alleging the background of slavery in the fiancé—hearsay evidence is inadmissible in Hanafi law to show allegiance or bondage;
2. the woman never admitted bondage in the history of her fiancé and the father failed to prove this.

The High Court continued in this learned opinion to review the law in the four orthodox schools of Islam regarding *al-kafa'a*. The importance of this landmark case in the Sudan regarding equality in marriage is underscored in these concluding remarks which draw upon the great juristic tradition of Sunni Islam to support the correctness of this decision.

As we have seen the Imam Malik Ibn Anas, founder of the Maliki school, regards equality to be in religion and no more. Some of the Hanafi jurists agree with this position. The Imam Ahmed Ibn Hanbal, founder of the Hanbali school, and Imam al-Shafi'i, added to the element of religion, correspondence between the husband and wife in genealogy, occupation, freedom and absence of defects.

However, the Hanafi school recognizes six elements for *al-kafa'a*, one of which is non-slavery and it is known that Abu Yusef, one of the disciples of the Imam Malik, differed with the Hanafi position. If a slave becomes famous or is known as a man of knowledge or virtue, this honor is superior to the honor of genealogy and wealth. Since there is not unanimity on this point among the Muslim jurists, it follows that judgment should be made according to the times and local conditions. God prefers marriage to the unmarried state which promotes the lustful as opposed to the legitimate relations between men and women, and this woman is seeking to legally bind herself in a marriage contract. Islam recognizes the equality of all people – 'People are like the teeth of a comb', the Prophet has said, 'There is no preference between an Arab and a non-Arab except by his God-fearing'. (Quoted from the translation and summary of the case prepared for the English-Arabic language journal, *Sudan Law Journal and Reports*, still unpublished; the case was decided in 1973.)

The opinion goes on to say that the fiancé holds a university degree in science and, assuming there is slavery in his origin (which was never proven), he became equal to the woman in any event. Moreover the history of slavery in the Sudan was one of commercial enterprise and does not, therefore, conform to the Islamic conception of slavery. In the Sudan all people are free of bondage in the Islamic sense, as the slavery which existed was a form of theft and robbery which was imposed by non-Muslim merchants.

The notion that a man and woman might be barred from marrying each other because of an alleged inherited inferiority, a legacy from the slave trade in the Sudan, was thus put to rest in this landmark case in 1973. The courage and conviction on the part of the young woman who opposed her father and legal marriage guardian's rejection of her fiancé is greatly to be admired and is very much a sign of the times in contemporary urban Sudan. Young women and men increasingly are beginning to make their own choices in marriage in preference to arranged marriages, and young women, more frequently than in the past, are rejecting the authority of their fathers in the choice of a marriage partner.

Faskh Nikah – Void Marriage

A marriage is rendered void in Islamic law if the conditions do not meet the requirements of a valid Muslim marriage, namely the consent of the woman or her guardian, the negotiation and payment of *mahr* and

the presence of legal witnesses to the marriage. Other conditions which would invalidate the marriage are those which are a barrier to marriage itself, including marriage within the prohibited degrees either consanguinal or affinal, fosterage, marriage to two sisters or to more than four wives at a time, and marriage to a woman who is not a *kitabiyya*, one whose religion is of the Great Books, i.e. Christianity, Judaism and, of course, Islam. Other temporary impediments to marriage include not marrying a woman during her *'idda* period or while the man or the woman is performing rituals associated with the *hajj*.

Faskh means annulment or abrogation (Asaf A.A. Fyzee, 1964: 160) because one or more of the conditions of a legal Muslim marriage have not been fulfilled. Under Hanafi law, and this point is enforced in the Sudan, a woman who was married by her father before the age of puberty has the right of option to dissolve the marriage and have it declared invalid or *faskh*. Legally now in the Sudan a girl has to be a minimum of 10 years of age and if a father wishes to marry a child this age he must appeal to the Shari'a Court to obtain permission to do so. This represents a mild reform of past practice where fathers were able to marry their minor girls at will. For such a marriage to be sanctioned by the court there has to be good cause shown, for example that the man is an especially good man of high reputation and the moment is propitious, or that the father may fear that the daughter is in danger of moral corruption which would ultimately end her chances for a good marriage. Although permitted, the practice of marrying such young girls is in fact quite rare and a good age for the marriage of young women is considered to be after puberty and in the mid to late teens.

In annulled marriage the woman nevertheless retains her right to *mahr* and the marriage can be voided after its consummation, as long as the *'idda* period is observed. Further, any children produced during cohabitation, despite later annulment, are legitimate. A case of *faskh nikah* was in the process of being litigated during my observation of court sessions in 1979.

A University professor wanted to marry one of his students and approached her father for permission to marry, which the father refused. The young woman then proceeded to ask her mother's husband, who was not her father but her stepfather, to act as her *wali* or marriage guardian. The stepfather agreed, the *'agid* marriage contract ceremony was held and the marriage was registered with the *maa'zun*. Upon learning of this the father raised a case claiming that the marriage was

invalid because of the lack of consent of the legitimate marriage guardian.

(Related by Advocate Sheikh Hassan al-Bodani, 17 November 1979).

In this case the court must decide whether or not the marriage is void; it decided that it was, because of the lack of consent from the true *wali*, and then the option was presented to the woman, to accept her father's position regarding the marriage or to ask the judge of the Shari'a Court to act as legal guardian to her marriage, whereupon the contract could be signed. The case raises the interesting legal point of what would have happened had the father not decided to raise the claim of illegitimate marriage. Clearly in the absence of the suit the couple would have lived as husband and wife in a socially recognized, but legally invalid marriage. The action of the *maa'zun* in registering the marriage without making the appropriate investigation regarding the woman's marriage guardian was subject to reprimand.

Another type of case of *faskh nikah*, which is increasing according to the legal professionals whom I interviewed, is the claim by a woman after the fact of marriage and cohabitation that she did not give consent to the marriage. Such cases have come before the courts in the wake of the shift in the law from the Maliki to the Hanafi provisions regarding guardianship and consent in marriage. Given that Hanafi law requires only the express consent of the woman for a valid marriage, while the Maliki traditions of the Sudanese give the consent role to the woman's father, confusion as to correct practice is to be expected. In the view of some judges, this lack of clarity provides an opportunity for some women, who find themselves in an unhappy marriage, to attempt annulment years after the marriage has been consummated and children have been born. It is very possible for a woman to claim lack of *express* consent, proving with witnesses that she did not actually utter the words giving consent to the marriage. In an attempt to curtail the proliferation of such cases, the government passed legislation in 1972 which specifically stated what is express and what is implied consent. Since it is considered unflattering to the female virgin to indicate in words her agreement to marriage which could be construed as a certain eagerness, the legislation identified a number of conditions which qualify as evidence that the woman has given implied consent to the marriage, for example not opposing the marriage in her behavior and her participation in the preparations for marriage, accompanying her husband to his house without resistance, continuous cohabitation or the production of children. This clarification apparently reduced the volume of cases of women claiming lack of consent in marriage; however, the option

of seeking a judicial divorce remains open to them, although a woman whose marriage has been annulled has a better chance of remarriage than a divorced woman.

Other cases of a marriage not being valid (*sahih*) involve simple ignorance of the law. I have seen cases where a woman, from a rural background, perhaps from a group recently Islamized, appealed to the court for divorce and during the course of the testimony revealed that it was her mother who had given consent to her marriage. Here the judge was faced with the legal choice of allowing the divorce on the grounds proven or declaring that the marriage was never valid in the first place.

Islam and Christianity in Marriage

The Sudan is not only ethnically diverse, but is varied with respect to religion as well. While the majority of the population is Muslim, about 70 per cent, a sizable minority are Christian, including Catholics (primarily educated southerners), Eastern Rite Christians (mainly Sudanese of Syrian and Lebanese origin), and Coptic Christians, Ethiopians and some Egyptians. Islam recognizes marriages between a Muslim man and a *kitabiyya*, a woman whose religion is one of the Great Books, like Christianity or Judaism. However, it is not lawful for a Muslim woman to marry a 'pagan' (animists would be included, of whom there are many in the non-Muslim regions), or for her to marry a Christian or Jewish man, since the man must be equal to or superior to the woman in religion and in other measures according to the standards of *al-kafa'a* in marriage. It is preferable that a non-Muslim woman convert to Islam before marriage to a Muslim man, however, it is not essential – it is essential that a non-Muslim man convert to Islam before contemplating marriage with a Muslim woman.

With the diversity which exists within Sudan's enormous borders, conflicts, tensions and misunderstandings are frequent with respect to the law, religion and marriage. A simple case of confusion as to the rule of law in these matters is illustrated in the following case:

A couple from the Nuba mountains came before the court because the question of the legitimacy of their marriage has been raised. The woman was pregnant, and it was clear from their remarks that they had cohabited for some time. Various witnesses testified that the husband is Christian and was so at the time he married the wife, who was Muslim. They testified that they had seen him going to church. Since the marriage he had converted to Islam, but in the judge's opinion this did not alter the fact that the marriage was invalid at the start.

The judge allowed that in this part of the Sudan, where Islam is not widespread nor thoroughly established, misunderstandings as to the proper way to conduct Muslim marriage can occur. Nevertheless, the marriage must be declared *faskh* or invalid, and the woman is thus free to marry this man or another as she likes. A marriage between them must be validated or the parties must be separated.

(Observed in Omdurman Appeal Court, 13 January 1980)

The question remaining regards the legitimacy of the child not yet born of this couple. Since the marriage was not valid in the first place, there is no recourse but to say that the child resulted from illicit cohabitation and is therefore illegitimate. However, the father can come to court, at a later time, and swear to his paternity and in this way legitimize the child.

Beyond confusion and ignorance of the law, there exists on occasion the calculated manipulation of the religious law for specific purposes. Sudanese Christian men have been known to convert to Islam in order to take another wife legally, or to divorce their wives to whom they are permanently bound in Catholic or Coptic rites of marriage and personal status law. Europeans resident in Islamic countries have been known to use the law as well. The following case is an extraordinary one; it is not typical of a particular trend, but it does illustrate the potential use of the law for a desired end, in this case polygyny:

A European man and woman appeared in Khartoum Province Court and with their lawyer acting as interpreter, they established their freedom to marry, and the marriage contract was prepared, signed and witnessed in court. This was the culmination of an eight month effort to marry that had taken them from Saudi Arabia to Lebanon to Abu-Dhabi and finally to the Sudan. The two had converted to Islam in Beirut and had hoped to marry there, but failed to get the necessary papers from their respective embassies certifying that each was free to marry, since the man was already married to a woman living outside of Europe. The woman had been married and divorced and she was able to get copies of her divorce papers.

In the Sudan they appealed to the Ministry of Foreign Affairs for permission to be in Sudan; they also applied to the Shari'a High Court which formally gave permission for the marriage to take place, since it was shown that they were converted Muslims and the woman was free to marry. The conversion to Islam gave

the man the legal right to take a second wife. The marriage was performed, witnessed by the judge and the lawyer representing them and soft drinks were brought to celebrate the occasion.

(Observed in Khartoum Province Court, 27 November 1979)

My curiosity aroused by this scene and the obvious time, energy and expense that had been exerted in this case, I arranged to meet them on two other occasions where I found them anxious to share their story. The two had lived together in a commune with the first wife prior to their taking up jobs and residence in Saudi Arabia. There they desired to live together, but were prohibited from doing so according to Saudi law. They began their legal sojourn travelling to a number of Arab countries before a friend recommended a lawyer in Khartoum who had provided his service in such a marriage before. Inquiring as to their motives, religious or practical, the woman indicated that they were primarily practical ensuring their ability to live together in Saudi Arabia where they both had lucrative jobs.

Polygyny

I have left the discussion of polygyny and Islamic law to the end of this chapter because of its relative unimportance in case law. This is not to say that polygyny is not an issue in Sudanese society at this time, especially as raised by feminist voices in the Sudanese Women's Union, but only that polygynous unions generally are not contested in court. Many young educated women currently say that they would not accept their husbands taking a second wife and they would apply for divorce in court on some accepted ground to be free of such an arrangement. Others may choose to have a monogamous union written into their marriage contract making polygyny unlawful to that union.

The simple fact is that polygyny is a rare phenomenon in the urban areas for which we have statistics and it is declining in the rural areas as well. The current rate of polygyny for the three towns has been computed at 0.1 per cent (cf. MEFIT Report, 1978). A national rate of polygyny has not been projected or estimated.

Because Islamic law mandates absolutely equal treatment of each wife and with inflationary increases in every sphere of life, taking a second wife is simply out of the question for most men. Indeed the rising new middle class and Sudanese bourgeoisie is making a conspicuous display of wealth in other ways than taking additional wives, including expensive houses, cars and other luxury items. Additional marriages and more family responsibilities are a traditional show of wealth that is on the wane.

More commonly the issue of separate accommodation for the second wife is raised in court. This is very much a contemporary concern as people have crowded into smaller quarters in the cities, and for the tiny percentage of men who opt to marry a second, third or fourth time they may have to contend with cases like the following:

A young woman accompanied by her small children, her mother and her husband appeared in court. The wife was complaining of *darar* or harm in her marriage because the husband had married a second wife and had installed her in the same house with the first wife and their three children. The husband said that there was some chance of a new house but the wife protested saying that this would not be in the good suburban location which she currently shared with her husband. The judge said that the Shari'a entitled her to separate accommodation, but it did not specify the location.

An older man, who had been appointed by the court as an arbitrator in a previous dispute between the couple, testified that a reconciliation between them had been reached in that dispute. The judge recommended that they settle this between themselves as well, but the woman refused saying that the harm was not to herself but to her three small children. The judge then ordered them to come back to court in three weeks' time and report on whether there had been any change in their relations, and if they had settled their differences.

(Observed in Khartoum Second Class Court, 5 January 1980)

While Islamic law is clear that separate accommodation for each wife is required, it is nevertheless acceptable, according to the judge in this case, if the wives are provided with a separate bedroom, bath and kitchen within a single, large house. The issue in this case then becomes adequate, separate accommodation for the first wife who is raising the suit against her husband. The wife, if she does not find relief in this case, could, at a future date, raise a case claiming *talaq al-darar*, or divorce because of harm or cruelty.

In terms of court procedure the judge in this case used a favorite tactic of Shari'a judges and that is to delay the case for some time in the hope that the couple will effect their own resolution to the quarrel. If they return, perhaps several times without a clear indication of a settlement, the judge will recognize that the trouble is deep in the marriage and will move to the next stage of marriage arbitration or even judicial divorce.

In cases such as the above, it is common for the court to uphold the rights of women in polygynous unions. The Qur'an, the *hadith* and the scholastic traditions are all very clear about equal provision being made

by the husband to each of his wives. Her specification about the location of the house is not an issue, unless the new house would represent a decline in the standard of living she has been accustomed to in her married life and in her father's house.

Marriage Arbitration

This topic will be discussed again in the chapter on divorce; here it suffices to say that marriage arbitration is used in cases where the court recommends this and the husband and wife agree to have two independent arbiters investigate and help in the resolution of their problems. It is often used where something is alleged in the marriage which cannot be proven with witnesses in court, or in a serious state of a marital dispute which still falls short of divorce. One arbiter is appointed from the husband's side and another from the wife's side, and they are instructed by the court as to the relevant law in the case: particularly emphasized is the law regarding obedience of wives and responsibilities of husbands.

Final Remarks

Socially, marriage is at the center of Sudanese Muslim life; legally, from the point of view of the Shari'a, the responsibilities established at the time of marriage are central as well and have a key effect on other areas of the personal law including support (*nafaqa*), obedience (*ta'a*), child custody (*hadana*) and, of course, divorce (*talaq*). Marriage rituals are at the center of Sudanese folklore, and the marriage of a man and a woman is the most important thing which happens in life, and is the vehicle for the second most important thing which happens in life, the birth of children and becoming a parent. The rituals associated with 'manhood' and 'womanhood', especially circumcision rites, are full of symbolism associated with marriage, focusing on the future marriage rather than the passing from childhood. The girl about to undergo circumcision is called the '*arusa*' or bride, and is dressed as a bride adorned with gold jewelry and has her hands and feet dyed with henna like the true bride. The law regarding all of the ancillary areas of *nafaqa*, *ta'a* and so on, returns to the marriage contract, the rights and duties inherent therein.

The law regarding marriage is therefore detailed, encompassing forbidden and allowed marriage partners, regulations for appropriate consent in marriage, the nomination and payment of the dower, the procedure for the contract-signing ceremony and for marriage to a non-Muslim and finally, for the annulment of the marriage itself. Each of these, and other features of Muslim marriage, has its own sub-area

in Islamic jurisprudence with a particular history of its scholarly interpretation of the sources of the law ('*usul al-fiqh*'). The law in the Sudan has undergone its own specific evolution, especially as regards the question of consent in marriage, 'obedience to the house' (*bayt eta'a*) required of wives and the changing notion of 'equality of standard' in marriage (*al-kafa'a fi zowaj*). In each of these areas the Shari'a jurists have adopted positions which are humane and progressive and very much in concert with prevailing Sudanese practice and opinion.

NOTES

1. Sudanese pronunciation; otherwise *al 'aqid*.
2. One of the best descriptions of traditional marriage in the three towns is 'Marriage Customs in Omdurman', *Sudan Notes and Records*, 26: 241–55 (1945) by Sophie Zenkovsky. Although much has changed since her writing, the basic description remains sound.
3. An estimate of the polygyny rate for the three towns (Khartoum, Omdurman and Khartoum North) in an urban planning study conducted by the Italian research agency, MEFIT, was set at 0.1–0.4% (*Regional Plan of Khartoum and Master Plan for the Three Towns*, Vol. 1, Phase I, Sept. 1974; MEFIT, Part II: 58).
4. The differences are discussed in much greater detail in 'Kafa'a fi Zowaj fi el fiqh el Islamiya', Bakhri Mohammed Ismail Bele, M.A. Thesis, University of Khartoum, 1975. The variation in opinion between the schools probably reflects the differing contexts in which each school developed, the Hanafi tradition being the more heterogeneous and class conscious.
5. In my own understanding of *al-kafa'a* I have profited greatly from discussions with Dr. Khalifa Babiker, who at the time of our meetings was Head of the Shari'a Department within the Faculty of Law, University of Khartoum.

CHAPTER SIX

THE LAW OF DIVORCE IN PRACTICE

INTRODUCTION TO SHARI'A DIVORCE

It is a little appreciated fact that the Sudan was a pioneer in the reform of the Shari'a allowing judicial divorce for women, this occurring in 1915–16 just after the Ottoman Turkish amendment of the law. In fact the reforms in both countries were influenced by progressive Muslim thought of the time, especially that of Mohammed Abduh, Mufti of Egypt at the turn of the century. Sheikh Mohammed Shakir, first Grand Qadi of the Sudan and an Egyptian national, had advocated reform in the law of divorce with Mohammed Abduh, recommending that the more liberal Maliki interpretation be accepted over the harsher Hanafi law which excludes almost entirely the possibility of judicial divorce for women. After the Turkish reform which permitted judicial divorce (*tatliq al-qadi*) for women whose husbands had deserted them or were afflicted with some disease or defect, Sheikh Mohammed Shakir took advantage of the pre-existing Sudanese Maliki base by not only introducing these reforms (in Circular no. 17) but including as well the Maliki provision of *darar* or cruelty in the marriage as sufficient grounds for divorce. These grounds, introduced in the Sudan in 1915–16, were adopted in a more restricted form four years later in Egypt and were expanded upon by the Sudan and Egypt in the late 1920s. However similar reforms were not introduced in other Muslim regions, Syria, Jordan, Iraq and Tunisia, for example, until the 1950s, so with respect to the amendment of the Shari'a regarding divorce regulations the Sudan and Egypt were pioneers.

Divorce (*al-talaq*) stems from the Arabic root meaning 'to release', and subsequent reform in the Shari'a in the Sudan has built on this meaning in so far as developments in the applied law have provided for the release of the wife, legally, from an unwanted marriage. In a recent reform (1977), the concept of *fidya* or ransom has been introduced into the divorce law allowing a woman to release herself from the

marriage through payment of a compensation to the husband who does not otherwise accept the divorce. This reform, and other specifics of the law regulating divorce, will be discussed herein after a general introduction to the theory and practice of this aspect of Islamic law and society in the Sudan.

As marriage is the binding of two families or social groups, divorce severs relations, not only between the husband and wife, but between the kin groups bound to each other in the marriage. Divorce is thus a serious rupture with social consequences beyond the unhappiness experienced in the marriage, and it is to be avoided if possible. Intervention of relatives when a marriage is in trouble is expected, and a Shari'a judge will certainly recommend mediation as a first step in the divorce process in an effort to save a marriage.

Divorce is a serious matter in the law as well and rests upon numerous quotations from the Qur'an and the *hadith*. 'Divorce is the most hateful thing permitted by God' for it is a barrier to conjugal enjoyment and it interferes with the correct upbringing of children. Particularly in Sura II, *Al-Baqqara*, in the Qur'an are the major pronouncements regarding divorce in Islam. The triple divorce was imposed for two purposes, first to restrict what is said to have been the pre-Islamic practice of repeated repudiation and recall of the wife by the husband and to this degree the triple pronouncement of divorce represented a reform. Secondly, it allows the husband to reconsider the serious nature of divorce and to be certain of his intention and real desire to dissolve the marriage.

The Muslim husband possesses the unilateral right to divorce his wife without making any justification for his action before any legal body or before the witnesses to his act of repudiation. The wife, however, if she desires a divorce, must place her claim before a Shari'a court and argue her case on the basis of one of the accepted legal grounds (see below). The various forms of repudiation will be discussed below, but the major point here is that the right of the husband to divorce, theoretically, is unrestricted. In practice in the Sudan and elsewhere in the Islamic world, a number of factors, religious, legal and social, operate to prevent abuse of this seemingly absolute power.

Perhaps the most concrete of these is the debt of *mahr* which is owed to the wife upon the dissolution of the marriage. The larger deferred payment must be made to the repudiated wife or she may extract it from him through legal means. Sometimes this debt of *mahr* is used as a basis in negotiations for divorce between the husband and wife, but in any event the presence of the dower either acts as a deterrent to divorce or it gives the wife some financial security or bargaining power. Of course, whatever gold jewelry or valuables the wife has received as wedding gifts or gifts at the birth of a child remain her property.

Families of the husband and wife will intervene in a troubled marriage. The wife may ask her brother or her father to go and speak to her husband regarding her complaints in the marriage. It is less likely, but a husband may ask the same role of mediation of his sister or mother. In this way the difficulties between the husband and wife are often made known to the rest of the family and they are in a position to pressurize, negotiate, rearrange things in an effort to find a solution. The husband, even with his unilateral power of divorce, is nevertheless subject to these family pressures and an unwise choice on his part could have disastrous social effects.

The husband is further constrained from uttering the triple pronouncement of repudiation '*talaq talata*' ('I divorce you three times') by the law of the Sudan. Judicial Circular no. 41, issued in 1935, nullifies expressions of divorce uttered in a state of intoxication, anger or under coercion. The clear intent to divorce must be unequivocal and a triple declaration made in front of witnesses amounts to a single divorce in the reform instituted by this Circular. The same Circular makes every divorce revocable, except the third divorce, giving a clear indication that the law favors reconciliation over final dissolution of a marriage.

Finally the husband's exercise of the right to divorce is muted by Qur'anic injunctions, being supernatural rather than social sanctions, and therefore having added force for the upright Muslim man. That divorce is not to be entered into lightly is expressed clearly in the Qur'an. 'And if they decide upon divorce [let them remember that] Allah is hearer, knower' (Sura II: 227, Pickthall translation). Capricious divorce is scorned, but not disallowed. The Qur'an further enjoins the divorcing husband that 'Divorce must be pronounced twice and then [a woman] must be retained in honor or released in kindness' (ibid; II: 229).

A large and influential body of jurists regard the unilateral power of divorce by the husband as really prohibited, except in necessity, such as the adultery of the wife. And another body of opinion from the jurists considers *talaq* as unlawful except when sanctioned by a Shari'a judge (Ameer Ali, 1880: 409). These thoughts drafted so many years ago have in fact been prophetic, for a modern trend in reform of the divorce law has been an increasing restriction of the one-sided power of the husband in favor of judicial divorce. According to the modern jurist, Asaf Fyzee, 'the law of divorce ... at least in the Hanafi School, ... had become a one-sided engine of oppression in the hands of the husband' (1964: 141). J. N. D. Anderson (1970: 41) has made a study of modern divorce law reform and many of the trends which he cites are characteristic of the development of the Shari'a in the Sudan. These, along with the unchanging aspects of the law regarding divorce, are discussed here.

Repudiation is of two types:

talaq al-rajia' – revocable divorce

talaq al-bain – irrevocable divorce, in the third instance

Repudiation by the husband in the Sudan is formally recognized as follows:

talaq al-rajia' – divorce in the first instance

talaq al-bain (bainuna soghra) – divorce in the second instance

talaq al-bain (bainuna kobra) – divorce in the third instance.

Divorce in the first and second instances is revocable during the '*idda*' period, with or without the knowledge or consent of the wife. Only the third divorce is irrevocable. In the mildest form of divorce, *rajia'*, the husband can take back the wife during the usual three month '*idda*' waiting period and he may do so without making a new marriage contract with a new negotiated dower. In divorce in the second instance, also, the husband may take the wife back during the '*idda*' period. However, the husband can only marry the triply repudiated wife after she has remarried, been divorced and passed the '*idda*' period to ensure she is not pregnant. In reality, the third divorce is most often utterly final, and subsequent remarriage of the pair is most unlikely. Any divorce, except the third divorce, is revocable, as is any divorce made without the presence or the knowledge of the wife.

The law further recognizes (1) approved (*al-ahsan*), (2) less-approved (*al-hasan*) and (3) disapproved (*al-bid'a*) forms of divorce. The best form (*al-ahsan*) consists of a single pronouncement during a period of purity (*tuhr*) i.e. when the wife is not menstruating, followed by abstinence from sexual intercourse during the '*idda*' period. The divorce is revocable until the expiration of the '*idda*', after which it is final and irrevocable. The less-approved form (*al-hasan*) consists of three successive pronouncements during three consecutive periods of purity, during which intercourse has not been practiced. The third pronouncement operates as a final and irrevocable divorce. The disapproved form (*al-bid'a*) occurs when a husband makes the triple pronouncement in a single sentence, 'I divorce you three times' or 'I divorce you, I divorce you, I divorce you'. In Hanafi law, such a divorce is lawful, but sinful. In the Sudan the practice has essentially been abolished since such pronouncements are most often uttered in anger or another mental state which renders such divorces unlawful according to Circular no. 41 (1935). This is more in accord with Maliki teachings.

In the Sudan, if a husband has clear intent to divorce (and he must be in a rational state of mind) he must express this in direct language. Circular no. 41 states that expressions such as '*khalia barra*' ('go out' [of the house presumably]) or '*tagania*' ('put on your clothes') only imply divorce and do not effect a divorce. If a wife comes to court claiming

that her husband divorced her by using such statements, that presumption of divorce can only be confirmed by an inquiry into the true intention of the husband. He must come to court and clearly state whether or not his intention was to divorce.

A very common expression used by men in the Sudan to emphasize a point or to induce another man to do something is '*Walahi al-talaq*' – ('I swear by divorce'). It is really a form of oath-taking and shows the seriousness of intent to do or not to do something, but it is not divorce. The intention of the husband to divorce, clearly stated, is the *sine qua non* of repudiation, and the event need not and rarely does occur in a Shari'a court. Moreover, it is not required that the divorce be registered with the *maa'zun*, but the tendency to do so is strong in the urban areas of the Sudan. This provides a protection for the husband and the wife when questions of maintenance from the date of divorce arise.

REASONS FOR REPUDIATION AND TYPES OF DIVORCE

I have not made a systematic study of the causes of divorce and these can only be inferred from the cases and the statistics from the Shari'a courts and the marriage and divorce registers.

An earlier study which I made on the subject of homicide in the Sudan (Fluehr-Lobban, 1973: 1976), based on over 400 murder cases from all over the country, put sexual jealousy as the primary context in which a homicide occurs in the northern, Muslim Sudan. Many of these cases had the threat of or the fact of divorce added to the social context of a homicide, particularly involving a formerly or currently married pair. I am not intimating that homicide and divorce are conclusively linked to one another, but I cite this study to make the point of the importance of honor and sexual conduct in Sudanese social affairs.

The suspicion on the part of the husband that his wife is having relations with men outside of the marriage appears to be a common allegation. It occurs regularly as a justification for divorce by the husband or some other action being contested in court, for example in *nafaqa* cases. The following example is illustrative:

A woman came to court claiming that her husband was in arrears of the maintenance payments he owed to her for support of their two children. The husband denied the claim saying that his wife was continually having relations with other men and the two children were not his. Before the court decided on the claim of *nafaqa* the judge agreed to hear testimony regarding the parentage of the children.

(Observed in Khartoum Second Class Court, 11 December 1979).

Prior to a divorce a husband will often accuse the wife of receiving other men in his house and steadfastly hold this view despite no proof of such relations. There is likewise an attendant fear on the husband's part of a wife who goes out of the house too often of her being unfaithful. To underline the importance of the husband's protection of his honor through the good, moral conduct of his wife (indeed all his female relatives), it is considered a justifiable ground for homicide if a man kills the illicit lover of his wife or female relative. The maintenance of high moral standards of the women in the family is its first line of defense in all matters of social acceptance and approbation and any breach or suspicion of a breach is an extremely sensitive point which can lead to negative social results such as divorce, or in the extreme, murder.

A husband may repudiate a wife who is repeatedly disobedient, that is if she flees his house without the intention of returning and resuming cohabitation. In this instance it may be perceived by the wife as a welcome release from an unwanted marriage. Of course, the husband can withhold repudiation which is desired by the wife as a kind of punishment, but he is constrained from repeatedly divorcing her and taking her back by the third and final divorce instituted by Islamic law as a reform measure.

Other reasons for divorce cited by men are limited sexual access to their wives (which, of course, may be symptomatic of a deeper trouble in the marriage and in any event is complicated by the widespread practice of female circumcision), barrenness (although it is considered kinder to take a second wife) and the inability to get along with the wife's relatives or alleged harassment by them. Since we are lacking a major sociological study of the causes of divorce in the urban Sudan, the foregoing comments are based on impressions and conversations with Sudanese legal professionals and ordinary citizens, over a 10 year period of conducting research in the three towns. The statistics reveal a different dimension, that of the frequency of certain types of divorce.

Statistical Survey of Divorce by Repudiation

A rather approximate divorce rate of 28 per cent for the three towns has been calculated using the following statistics for the years 1975–1978. This has been done by taking a simple percentage of the number of marriages registered with the *maa'zuns* as against the number of divorces. It is a difficult point to investigate, but there is no reason to suspect that individuals are more likely to register marriages than divorces. A case could be made for a certain shame attached to the registering of a divorce, but this should be neutralized by the advantage of recording the date of divorce in case of future litigation which might

TABLE 1

Marriages and Divorces Registered in the Three Towns, 1975–78 by the Maa’zuns

	1975		1976		1977		1978	
	Marriages	Divorces	M	D	M	D	M	D
Khartoum	2413	918	2193	864	2352	952	1823	574
Khartoum North	1262	390	519	321	2051	766	605	220
Omdurman	1833	653	1963	379	3483	394	3047	351

TABLE 2

Total of Marriages and Divorces for Four Years in the Three Towns

Marriage	Divorce	Percentage of Divorce
23,544	6692	28%

TABLE 3

*Marriage Contracts and Divorce Documents issued by Maa’zuns in the Sudan
1950–1952; 1966–1970*

Year	Marriages	Divorces	Percentage of Divorce
1950/1	15,583	6,131	39%
1951/2	19,613	7,131	36%
1966/7	21,449	7,741	36%
1967/8	18,483	7,371	39%
1968/9	20,529	7,531	36%
1969/70	21,130	7,645	36%

(Statistics Courtesy of Department of Statistics, the Sudan Judiciary)

arise from divorce. In any event it is certain that the registration of marriages and divorces is far more common in the urban areas than in the rural areas.

The relative stability of the proportion of divorces to the number of marriages registered with the *maa'zuns* over the thirty year period cited requires some explanation. First, society in the Sudan did not rapidly urbanize until the 1970s, and we know that statistically divorce tends to increase with urbanization as one measure of stress to traditional ties, including marriage. But why is there not an increase in divorce during the ten year period when the major urban center of Khartoum more than doubled its size? One possible explanation may be that the tendency for divorce to increase under the stress of rapid urbanization has been checked or counterbalanced by the increasing expense of marriage, the rising *mahr* costs and inflationary increases in everything from housing to clothing to food and basic commodities. As mentioned earlier, many men must postpone marriage for many years simply because they cannot afford it. Once married, divorce may be avoided because of the same or worsening high cost of remarriage. Divorce, then, may be avoided by men who fear their social isolation from family life and the financial inability to start afresh.

The calculation of percentage is based on the number of divorces as a proportion of the total number of marriage contracts registered. Again considerable caution must be used, taking into account the subjective factors which influence marriage and divorce registration and the fact that in much of the rural Sudan the services of a *maa'zun* may not be readily available. A *maa'zun* is always attached to a Shari'a court, but the courts tend to be clustered in the towns. Some *maa'zuns* do travel to the countryside contacting people at least once a year to gather information on recent marriages and divorces, but such work is neither regular nor systematic.

Given these reservations we can tentatively suggest a divorce rate in the Sudan that is about one third of all marriages contracted. Conversely we can suggest that approximately two-thirds of Sudanese marriages are stable and end more frequently by the death of a spouse than by divorce. The proportion of divorce to marriage for the urban centers of Khartoum and Khartoum North is roughly equivalent during a later time period. The Omdurman divorce figures are low by comparison.

When comparing these statistics to those of another African Muslim society, the Kanuri of northern Nigeria (Cohen, 1971), the rate of divorce in the Sudan appears moderate. Cohen reports that at the time of his survey 74 per cent of all urban marriages ended in divorce, with 52 per cent of all rural unions dissolved through divorce (1971: 136). Divorce rates from the rural Sudan have not been computed and their collection

and analysis remain a project for future study. Lacking exactly comparable statistics and a more sophisticated breakdown of the data available, one hesitates to overgeneralize on the basis of the simple rate of divorce, but it is hard to ignore the fact that nearly twice the number of people are likely to be involved with a divorce among the urban Kanuri as in certain urban areas of the Sudan. The variables which Cohen cites as indicative of unstable unions include infertility in the union, urban residence of the couple, wife considered to be disobedient and not helpful, the husband not providing the wife with sufficient market money, as well as differences between the husband and wife in age and occupational rank (1971: 152).

Studies of divorce in neighboring Egypt give a very different picture indeed with an urban rate of 2.9 per cent for the cities of Cairo and Alexandria and an even lower rate for the rural areas at between 1.2 per cent and 1.9 per cent (Nawal al-Saadawi, 1980: 204). The discrepancies are undoubtedly attributable to differences in statistical reporting, for despite important differences between the Sudan and Egypt, there is nonetheless a certain uniformity in the cultures of the Nile Valley.

Enid Hill in her studies of the Egyptian legal system (1979) indicates a higher rate for the society with an average of about one divorce for every 4.5 marriages, this figure computed from government statistics (p. 86). Since there is no distinction in the reporting between divorce by repudiation and judicial divorce by women, it can only be surmised by courtroom observation that a large number of women are seeking legal separation from their husbands. Since court costs and lawyers' fees are relatively high and witnesses must be compensated, Hill suggests that a larger number of women initiate cases than are able to complete them, and their raising a case may have the effect of inducing the husband to repudiate them.

Harold Barclay's study of a suburban village outside Khartoum (1964: 124-5) reports a village rate of divorce of 19.4 per cent with 427 marriages by 310 men with 75 of these ending in divorce. Barclay indicates that these figures from the early 1960s are undoubtedly substantially underestimated for people were reluctant to discuss divorce and may not even have bothered to mention a marriage that lasted a short time. An interesting side point is that the number of marriages and divorces with the preferred *bint'amm* (*fabrda*) was about the same at 11 per cent and 12 per cent respectively; however, an important difference existed in the proportion of divorce for marriages with relatives versus non-relatives, with a 52 per cent rate for the former and a 67 per cent rate for the latter. This shows the deterrent effect of endogamous marriage on divorce and is one of the chief stated reasons of this type of marriage.

To continue this analysis of divorce a bit more, during 1978 in Khartoum Shari'a Court 957 divorces were registered with the *maa'zun* attached to the court. That same year 359 judicial divorces were granted, so that approximately three-quarters of the divorces for that year in Khartoum were by traditional repudiation. It is worth noting here that a significant one quarter were attained by litigation in court and were in the majority of cases initiated by women. The initial breakdown of divorces registered in the Khartoum court in 1978 reveals the following pattern:

Type of Divorce	Number
<i>talaq owal rajia'</i> (first, revocable)	677
<i>talaq tani rajia'</i> (second, revocable)	107
<i>talaq bain talat</i> (irrevocable divorce)	56
Total	840

Talaq owal rajia' is the mildest form of revocable divorce – it is literally the 'first divorce' which is *rajia'* or returnable. It is often referred to as the 'warning' divorce and may have the function of bringing a troubled marriage to a crisis point after which the stage for reconciliation may be set. When asked about the high number of 'first' divorces, the *maa'zun* and Shari'a judges report that in the majority of cases the husband will take the wife back before she completes her *'idda* period. Significantly, these statistics show that the exercise of the power of the husband to divorce is restrained, as the divorce is not completed. The 'second' divorce (*talaq tani rajia'*) is considerably less frequent (one sixth or one seventh of the number of 'first' divorces) and suggests, indeed, a high rate of reconciliation. The third and final divorce (*talaq bain talat*), 56 of the total number, demonstrates the trend, that frequency decreases as the seriousness and irrevocability of the divorce approaches. This divorce falls into the category of *bain* or irrevocable divorce.

The further breakdown of the divorces registered with the *maa'zun* at Khartoum Court in 1978 is shown in Table 4. This Table shows 86 per cent of registered divorces to be of the mildest, revocable type. It shows relatively few negotiated divorces or those involving some form of compensation. For the same period there were 359 judicial divorces in Khartoum Shari'a court, showing that only 28 per cent of all divorces took place in court in Khartoum.

We have considered the vast majority of cases of registered divorce which are revocable. The minority of cases fall into the category of *bain* or irrevocable divorce, in this survey amounting to only 173 of the total of 957 divorces. The distinguishing characteristic of the two forms of *bain al-bara'a*, irrevocable divorce in the first and

TABLE 4
Divorce by Repudiation, Registered in Khartoum Shari'a Court, 1978

1. First revocable divorce (<i>owal rajia'</i>) ¹	677
2. Second revocable divorce (<i>tani rajia'</i>)	107
3. Third divorce, irrevocable (<i>talaq bain talat</i>)	56
4. First divorce, <i>bain</i> ² <i>al-bara'a</i> ³	76
5. Second divorce, <i>bain al-bara'a</i>	7
6. First divorce, <i>bain</i> , before marriage consummation	12
7. <i>Khula'</i> divorce (negotiated by mutual consent)	2
8. <i>Khula'</i> divorce with <i>al-bara'a</i>	6
9. First <i>bain</i> divorce	8
10. Second <i>bain</i> divorce	6
Total	976

- 1. *Rajia'*, revocable and the husband can cancel the divorce without consent of the wife during the 'idda period only.
- 2. *Bain*, more serious than the first 'warning' divorce. The wife has, at this point, passed the three-month 'idda period after the first divorce, and the husband cannot revoke the divorce without the wife's consent.
- 3. The wife releases the husband from financial responsibilities to her in return for the divorce.

second instances, is that they are forms of negotiated divorce where the wife surrenders her right to the payment of *mahr* in exchange for the husband's release of her duties to him in marriage. In irrevocable divorce both spouses lose all rights of mutual inheritance. In *bain* divorce the husband cannot take the wife back during the 'idda period without her consent. Instead, if he wants the wife back, he must make a new marriage contract with a new dower negotiated. The example of *talaq bain talat* (irrevocable third divorce) generally is not found in the Sudan for such a divorce forbids the remarriage of the divorced wife until another marriage has been contracted and a divorce pronounced. In some societies a man who marries and divorces as a service in such cases exists, *al-muahhil*, but this is not found in the Sudan and is considered *haram* or forbidden. The first divorce *bain* is a form of irrevocable divorce which takes place before consummation of marriage, but after the signing of the marriage contract. In this case the 'idda period is suspended and the wife is not entitled to *nafaqa*.

The essential point made by the detailed description of divorce statistics from the Khartoum Shari'a court is that the vast majority of

the registered divorces fall within the first and second revocable type, that is, a high probability exists that a reconciliation was effected. In recalling the 28 per cent to 39 per cent divorce rates reported earlier in this chapter, it is well to remember that it is likely that a relatively high proportion of those revocable divorces registered also resulted in reconciliation.

Divorce by Mutual Consent – Khula' and Mubara'a

Khula' divorce is negotiated and is understood as divorce by mutual consent where the wife agrees to pay the husband or to release him of a portion of his debt of *mahr* to her. Both *khula'* and *mubara'a* as forms of negotiated divorce operate as irrevocable divorce and thereby marital life cannot be resumed by reconciliation; a formal remarriage is required (Asaf A. A. Fyze, 1964: 158).

In both forms of negotiated divorce an agreement between the husband and the wife is drawn up whereby they specify the terms of the mutually agreed upon divorce. The initiative is frequently with the wife who wants a divorce without the shame of going to court. In relinquishing all or part of the *mahr* she obtains the desired release, but does not lose her rights to maintenance and custody of the children. Like the marriage contract, anything which is not contrary to the Shari'a can be negotiated and put into the agreement, for example visiting rights of the non-custodial spouse with the children. While it is at present not required in the Sudan, it is certainly preferable that the divorce and the agreement be registered with the *maa'zun* with witnesses present, both of which help to enforce, but do not guarantee the enforcement of the agreement.

Lest too amicable a picture be portrayed here, let me say that divorce is not pleasant, whether it is by repudiation, negotiation or judicial decree. The following case demonstrates that *khula'* divorce, while potentially the most amicable of the means of dissolving marriage, is not necessarily free of contention.

A young woman of about 20 years of age came to court for confirmation of a divorce which she claimed took place some months ago. She said he pronounced the words 'Anna khalatik' – 'I divorce you by *khula'*' in front of witnesses and she agreed to pay him £S200.00. She wanted the divorce confirmed so that she could receive her maintenance for three months of *'idda*.

The husband was also in court and he denied that he divorced her or that he received any money from her. He further accused her of being a loose woman and having relations with other men.

She replied that this accusation was the reason for the divorce, that he continually insulted her and called her a prostitute. Since the woman was the petitioner, she had brought witnesses, men both of whom testified that the *khula*' divorce was pronounced and that the wife paid the husband £S200.00 plus some of her jewelry.

The husband, seeing that the case was going against him, tried to shift from a divorce case to one where he claimed that the wife was disobedient. The judge was amused by this and decided that the wife had proven that divorce by *khula* had taken place and he confirmed this and told the wife to file a claim for *nafaqat al-'idda*.

(Observed in Khartoum Second Class Shari'a Court, 29 December 1979).

MARRIAGE ARBITRATION

In the Qur'an in the section entitled 'Women' it is said, 'And if ye fear a breach between them [the man and the wife] appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment, Allah will make them of one mind' (Sura IV: 35). Any time a husband and wife come before the court seeking divorce the judge will explore if there is a way to reconcile their differences. Often a judge will listen to the grievances on both sides and postpone the case until some weeks or months after the date of its initial hearing. This allows some time for a possible settlement to be worked out between them, informally.

If the conflict is more serious, but still the judge sees some room for possible reconciliation, he will suggest marriage arbitration (*al-tahkim*). The procedure for this is outlined in Section 15 of Circular no. 17 (1915) which provides for judicial appointment of an arbiter from each side who will investigate the underlying causes of the marital disharmony and report these back to the judge. If relatives who can act as arbiters are not available, the judge can suggest two independent and fair arbiters (*al-hakamain*) who in fact may be attached to the court itself. If they succeed the judge will be informed so that he may order the spouses to live in peace and harmony. If, however, resolution is unattained, divorce may be the only recourse. If the arbiters are convinced that the insult is from the husband, the judge may divorce them irrevocably (*bain*). If the problem is from the wife, the husband may divorce her, and if both are at fault or the situation is unclear, the judge will divorce them, also *talaq al-bain*.

The clear intent to divorce on the part of the husband must be ascertained in any judicial review of that divorce. Section 2 of Circular no. 41 (1935) states that 'no divorce is possible if a husband sets

impossible conditions and then divorces his wife for her failure to obey'. If the intention is to terrify or intimidate the wife then the words implicitly or explicitly mentioning divorce amount to nothing more than a threat of divorce. If the intent to divorce is real, then laying down conditions is truly a prelude to divorce by the husband. The difficulty is that the wife may be confused as to the real intent of the husband and may have to raise a case in order to force the husband to declare his true intention. This brings the dispute to a head and settles the matter as to whether divorce has or has not taken place. The Circular was issued in 1940 to act as a preventative to the use of divorce by the husband as a weapon to instill fear in the wife and thereby to demand her obedience in areas other than those commanded by the Shari'a.

JUDICIAL DIVORCE

The majority of judicial dissolutions of marriage are initiated by women. Of the work in the courts involving matters of personal relations between husbands and wives including marriage, divorce, maintenance, obedience and child custody, divorce is the second most common, after maintenance.

Bringing a case involving divorce to the court must be viewed as a last act of desperation on the part of the woman. It is shameful for her and for her family, and it is shameful for the husband and his family, for divorce symbolizes the breakdown in relations not only between the husband and wife, but between the two larger social groups. The blame, if we can speak of this in divorce, rests with the families as well as with the man and woman for their intervention at critical moments might have saved the marriage. The disgrace falls most heavily on the woman who must bring herself to a public court and reveal some of the most intimate details of her life in her plea for legal separation from her husband. Some women, in an effort to avoid this public exposure, will ask their husbands to repudiate them or attempt to negotiate divorce. Others have laughingly suggested that they endeavor to make their husbands so miserable that they will divorce them. Even my own visits to the court when I was unaccompanied were subject to scrutiny with strangers inquiring if I had a case before the court. My female friends would refuse to accompany me to court for fear they would be seen, and one day when I had to bring my three year old daughter to court because her school was closed, the taxi driver clicked his tongue in a gesture of sympathy that I and this little girl had to plead our case before the court. All of this serves to underscore the social stigma attached to having to use the courts, especially for women, and this is why all court reporting and summaries of cases in the Shari'a are kept

anonymous. In the Sudan and in the Islamic regions generally women prefer marriage over divorce and in fact fear divorce and the economic instability and insecurity it engenders. It is not considered 'liberating' to be divorced, and the future of the divorced woman is not bright. She will no doubt return to her father's house and her chances for remarriage in the Sudan are almost nil, unlike the divorced husband. Following upon the shame of divorce may be the need to return to court to obtain her legitimate rights to support, and indeed *nafaqa* cases are the most common of those involving husbands and wives. In short, many women prefer the economic and social security of married life, even in an unhappy marriage, to the dire social consequences of divorce. At this point in time Sudanese women are still overwhelmingly dependent on their families and husbands for economic support and only seven per cent of women are in the work force, although this is increasing. Women own their own property, their gold and have unquestioned rights in inheritance, but these do not, generally, amount to financial self-sufficiency. So, divorce is to be avoided, yet despite this one-quarter of all divorces completed in the three towns are judicial divorces. In the rural areas we expect this to be much less. While divorce itself does not seem to be increasing appreciably as reflected in the statistics from the *maa'zuns*' record books, judicial divorce on certain recognized grounds is reported to be increasing.

Maliki law is generally regarded as the most liberal of the four schools in recognizing a woman's right to petition for divorce. It recognizes the following legitimate grounds for divorce:

1. Non-support, lack of sufficient *nafaqa*
2. *al-darar* – harm or cruelty, physical or mental
3. Lack of consent to the marriage by the woman
4. *al-ayb* – physical defect in either of the spouses; disease or impotency in the man
5. *khof al-fitna* – fear of temptation after long separation or desertion of the husband.

The statistics on judicial divorce are not broken down into types, so it is impossible to say with any degree of mathematical certitude that one kind of divorce is more frequent than another. However, according to the impressions conveyed by professionals in the Shari'a law, lawyers, judges and legal clerks, certain types of judicial divorce are increasing in frequency. There is agreement that cases of *talaq al-darar*, divorce because of cruelty, are increasing, especially as the interpretation of *darar* has been liberalized to extend beyond the use of physical cruelty against the wife by the husband. Also the shift in legal opinion regarding consent in marriage away from the sole consent of the father or marriage

guardian to that which includes the bride herself, has resulted in an increase in the number of divorce petitions where the wife claims original non-consent. Beyond these changes in the law, the worsening economic situation in recent years has brought about a greatly increased incidence of non-support cases and of appeal for divorce on the ground of non-support. Closely allied to divorce cases are *nafaqa* cases where a divorce has occurred or there is some breakdown in the marriage, and *ta'a* cases where the wife has fled an unhappy marital situation. The following table indicates the relative frequency of each in the three towns during a one year period in 1978–79.

TABLE 5
Frequency of Divorce Related Cases, 1 July 1978 to 30 June 1979

	<i>Talaq</i>	<i>Nafaqa</i>	<i>Ta'a</i>
Khartoum	359	479	185
Omdurman	385	541	363
Khartoum North	309	491	167
Total	1053	1511	715

Talaq al-Darar – Divorce because of Cruelty or Harm

Circular no. 17 (issued ca. 1915) set forth the basic rules governing divorce because of cruelty, and in doing so drew upon the Maliki legal traditions and made them law, thus breaking new legal ground in the Muslim world by introducing this type of divorce. Section 14 of this Circular, so remarkable because of the reform it brought to the law of personal status, states that ‘if a wife continuously claims that her husband is causing her harm, by beating or abusiveness, and that marital life between them has become intolerable, and this is confirmed by the husband’s own confession or with witnesses, she is entitled to obtain a decree for dissolution of the marriage and the divorce is irrevocable’. The Hanafi legal traditions do not recognize ill-treatment as a ground for divorce and the incorporation of *talaq al-darar* was considered an important addition to the law reflecting the sentiments of Sudanese and Egyptian reformers and of Maliki traditions in the Sudan. Maliki jurisprudence, depending as it does on the local traditions of its followers, allows the assessment of cruelty to be measured according to the standards of the community. In one community repeated insult

or physical ill-treatment may need to be shown to have *darar* proven. In another community or social grouping a single occurrence of a deep insult may be sufficient to make the continuance of married life impossible. Sheikh al-Gizouli related to me a case of *talaq al-darar* where the husband committed adultery with the wife's sister while she was recuperating from childbirth and the sister had moved into their home to assist with the household chores while her sister was incapacitated. Once they were discovered the woman petitioned the court, and when the adulterous relations were admitted, the judge immediately confirmed *talaq al-darar* for clearly normal marital relations could not be resumed and life with such a husband had become intolerable.

Such deep insult to the woman is an unquestioned ground for the pronouncement of divorce by the court. But the severity of the insult is not always immediately obvious and judgment may rest with a deeper inquiry into the case and some assessment of the effect of the insult on the social standing of the woman and her ability to resume normal life. Simple ill-treatment repeated numerous times may amount to *darar*, but a single instance of severe insult or ill-treatment may also be accepted as *darar*. The following case raises a number of these points – it was reviewed on appeal before the Shari'a High Court:

The applicant's father instituted a suit on her behalf at Khartoum District Court claiming dissolution of the marriage on the following grounds: (1) The husband had accused his wife of not being a virgin at the time of the consummation of their marriage. (2) He spread this rumor throughout the neighborhood. (3) Consequently the wife was medically examined and the charge was not confirmed by the medical evidence. (4) Finally the wife could not bear to continue married life with the husband and applied for divorce because of the deep insult against her.

The husband testified that he still held the belief that his wife was not a virgin at the time of their marriage, but he maintained that he wanted to keep her as a wife. He denied spreading the story in the neighborhood and said he only told the wife's mother and in confidence. At the lower court, the case was dismissed because, although the insult was grave, it was not repeated.

Two days later the applicant appealed the case before the Province Court where she added to her former list of grievances that the husband had been convicted and sent to prison for having defamed her through false allegation. When he returned from prison and came to her house he said on two occasions that the girl was 'sayba' (of loose character). The Province Court upheld the lower court decision using the same argument that the maltreatment

of the wife did not recur enough to constitute dissolution of the marriage. The applicant then appealed the case to the High Court for reversal of the two previous decisions. The judges agreed that her appeal raised the issue of the interpretation of Circular no. 17 regarding *talaq al-darar*. The judges of the High Court concluded that from the moment of the false accusation, the continuation of married life became impossible. There was no question but that she suffered harm and ill-treatment in so grave a manner that continued married life was intolerable and impossible in Muslim society which seeks to protect the honor and chastity of women. As such it need not recur, especially since it took place at the inception of their marital life.

The High Court ordered an irrevocable (*bain*) dissolution of the marriage on the ground of *darar*.

(Shari'a High Court, Cassation Decree No. 5; 1973, 26th Muharran 1393 A.H. – 2 February 1973. Judges presiding: Sheikh Mohammed al-Gizouli, President, Sheikh Magzoub Kamal al-Din, Sheikh Ahmed Abu al-Gasim.)

It is the persistence of the woman, acting through her father as agent, that is noteworthy. Given the sensitive nature of the case with open accusation of sexual misconduct, it is entirely understandable that the woman would not appear in court on her own behalf for to do so would surely add to her sense of social shame and stigma. However, through her father she persisted beyond two lower court decisions which did not recognize the insult to her as consisting of a harm to her sufficient to allow divorce on the ground of *darar*. The Province Court, on the first appeal, while not recognizing the harm caused by grievous insult did suggest the granting of divorce for *li'an*, or the accusation of adultery. *Li'an* or divorce by mutual imprecation is a specialized topic in Muslim law which allows judicial dissolution of a marriage whereby the husband accuses the wife of adultery and the wife, by oath-taking, swears it is untrue. The wife in such cases is entitled to file a suit for dissolution of the marriage (Asaf A. A. Fyzee, 1964: 159). The High Court judges in this case rejected *li'an* as a ground for divorce because this is interpreted as the accusation by the husband of cohabitation by the wife with another man, and this must be proven with four male witnesses. The husband never attempted to prove his accusation, and his continuation of the insult after a medical examination suggests some irrational attachment to the idea of his wife's sexual impropriety. The legal-social importance of the case is that *darar*, divorce for cruelty, is allowed as a result of a single, severe instance of insult or injury.

In other cases, perhaps more traditionally interpreted as cruelty, the proof of harm or intent to harm is clear. The following case illustrates the point:

A woman came to Khartoum Province Court requesting divorce because of cruelty alleging that her husband beat her on separate occasions in 1968, 1969, and 1972, after which she refused to be reconciled with him. The husband denied the accusation, but she brought with her two witnesses who testified that they saw the wife after he had beaten her and that he admitted the beating and said 'if I had a gun I would have shot her'. They also testified that the wife showed physical evidence of the beating with blood around her eye and nose. The witnesses also testified with the wife that her mother and sister were also threatened.

The husband continued to deny that his brutality was proven during successive appeals brought by him in 1974 and 1975, after divorce because of cruelty was granted to the wife. On his final appeal before the High Court, the divorce was granted because of the repetition of the beating and because of the threat of violence against her and members of her family.

(Shari'a High Court, Cassation Decree No.143/1975; Honorable Sheikh Mohammed al-Gizouli, President, Honorable Sheikh Magzoub Kamal al Din and Honorable Sheikh Sid Ahmed al Awad)

Some of the most interesting legal interpretations in contemporary issues in the Shari'a have involved the question of *darar*. Since Circular no. 17 admitted the possibility of divorce because of cruelty, the problem of the definition of cruelty and its application to conditions of Sudanese life became apparent. Section 14 of Circular 17 establishes repetition of the harm as the essential criterion; however, evolving juristic opinion on this point came to disagree with the necessity of repetition of a serious injury, as is illustrated in the foregoing case where the husband accused the wife of sexual misconduct. Circular no. 59 (1973) addresses this question, admitting that repetition of cruelty is not a matter of consensus in all of the schools of Islamic jurisprudence. It further notes that the Egyptian Ordinance of 1929 avoided the problem of the repetition of harm by phrasing the legislation 'if the wife claims that she is harmed by her husband in such a way that relations between them cannot continue...', then she may petition for *talaq al-darar* (Fluehr-Lobban, 1983: 135). Likewise the earlier Circular no. 17 does not provide for the use of criminal court records to establish a proof of cruelty on the part of the husband. Thus Circular no. 59 amends the Section in Circular 17 and adds to it that 'harm or *darar* is confirmed by all means of proof,

for example a confession, official papers of the criminal courts or customary courts; also *darar* is confirmed if there is a conviction against the husband from any court for causing harm to his wife' (ibid, p. 80). This point in the Circular represents an important recognition of the decisions handed down in the parallel system of Civil courts which includes criminal actions. Prior to this official recognition, the separate fields of jurisdiction between the Civil and Shari'a courts kept one from admitting as evidence the proceedings of the other.

Circular no. 61 (1977) also takes up the question of *darar* in section 5. Here the Circular instructs the legal professionals to advise a woman who has been denied a claim of divorce because of cruelty that she may again raise the same petition one year after the date of the rejection of her claim. In doing so she must put in the second petition (1) that there was a prior claim of *darar*, (2) that one year has elapsed, (3) that there have been no relations between her and her husband for the year, and (4) that it has become difficult to remain in the husband's '*isma* or protection since the claim was rejected. Once the second case has been heard, if *darar* still is not confirmed, two arbitrators should be sent by the court to separate the couple as they see fit (ibid., p. 138). The growing sensitivity of the Shari'a High Court judges to the question of cruelty as a ground for divorce is clearly evident in these recent Circulars and matches the increasing frequency of such cases in the courts. Circular no. 61 continues the trend and nearly perfects it in so far as is possible within the interpretation of *darar* within the Shari'a.

*Divorce by Fidya (Ransom or Redemption), a Unique
Sudanese Innovation*

The Sudan not only is legitimately credited with introducing divorce because of cruelty (*talaq al-darar*) to the Muslim world in the early twentieth century, but it has consistently developed and refined this aspect of divorce law making it a leader in this arena of substantive law. The interpretation of cruelty as psychological abuse, even verbal abuse, has been added to the more constrained interpretation of physical violence against the wife. Desertion, non-support and the withdrawal of sexual rights in a marriage are all interpreted as forms of cruelty to wives, making them grounds for divorce in the Sudan. Most recently an entirely new innovation has been added to the divorce law, the concept of ransom (*fidya*) to be employed by the wife in seeking a divorce.

There is a legal conundrum in which a woman might find herself where she is trapped between a state of disobedience and an inability either to be divorced or to obtain a judicial divorce. The following case is typical of the legal bind which a wife will face when she flees her husband's

house and then attempts to obtain a divorce and subsequent maintenance payments. The case was related to me personally in the presence of the client's lawyer, and to that degree it can be said to be a biased account of the events.

A woman in her early thirties was married to a man about 15 years her senior. Since they were married she complained there had been problems with his forbidding her to go out to relatives' weddings and on occasion he beat her. The last episode of violence, she left his house and went to the house of her brother in Khartoum and the husband came after her. She had taken the children with her, a girl of 13, a boy of 11 and a young girl of 5 years. He came into the house shouting 'What do you want?' She responded that she wanted him to divorce her. He said, '*Khalas intaligi*' ('you are divorced'). He then beat the older girl and a fight broke out between him and the wife's brother. He then took the two older children with him. When they first appeared in court over the matter the wife asked that the children be returned to her, but the judge refused because they were at the age when they could be with their father in his custody. He had since refused to let their mother see them using them as a ruse to get the wife to return to him. He had also sent a number of influential people to her to persuade her to return to him. He had been giving her £S90.00 a month, but he had stopped his *nafaqa* payments to her since he claimed that she was *nashiz* or disobedient. She was seeking divorce because of cruelty.

(Client of Sheikh Hassan al-Bodani, Shari'a attorney, related on 27 January 1980)

Circular no.61 (1977) responded to the growing number of cases of disobedience on the wife's part where her desire and intention is to be free of the marriage, but the husband refuses to divorce her. In cases of disobedience the wife usually refrains from having relations with the husband, while the husband usually refuses to divorce her. The wife can petition the court for divorce on the ground of *darar*, and the action incapacitates the husband from obtaining further decrees for obedience because of the wife's claim of *darar* in the marriage. The husband may refuse to divorce the wife as punishment for her disobedience and the wife is unable to obtain support payments (*nafaqa*) because she is in a state of legal disobedience. The dilemma is real enough and common enough that Circular 61 was issued to provide a way for the wife to extricate herself. The disobedient wife may petition the court for divorce by *fidya* or ransom; in that the wife pays for her freedom. *Fidya* is a term which derives from the ancient Islamic practice of paying something

in return for just treatment or freedom. In the days of the Arab–Islamic conquests, the conquered could pay some *fidya* in order to redeem themselves from punishment. *Fidya* could also be paid by a slave to his master in order to become free, and the term is more generally known in this sense.

The use of the term *fidya*, the act of ransom to ‘redeem oneself from punishment’,¹ is quite interesting in that it uses an old concept of ransom from slavery in this new sense with reference to freedom from an unwanted marriage. This is only one way that the Circular represents a novel departure in juristic thinking.

According to the Circular the court will accept the claim for divorce by *fidya* once the state of disobedience has been confirmed by judicial decree and a period of two years has lapsed since the beginning of the disobedience. She must state in her petition what she can pay, in cash or intangibles, and that she is suffering in the marriage and is abandoning her rights in marriage.

If the husband accepts the payment of *fidya*, he will be ordered to divorce his wife. If he refuses, the judge should grant the divorce. If there is some disagreement between the spouses as to the specifications of the divorce, the court may send two arbitrators to complete the case as they see fit.

The introduction of the concept of *fidya* or ransom into these special cases of divorce is really an extension of and a broadening of the meaning of *darar* as a legitimate ground for divorce in the Maliki school. The reasoning behind this enlightened Circular as written by the last Grand Qadi, Sheikh Mohammed al-Gizouli, is as follows: the Circular strives to resolve cases of longstanding disobedience (*nushuz*) by the wife in allowing her to ransom her freedom by payment of *fidya*. The disobedience arising from a claim of *darar* or cruelty naturally would not allow a wife to resume relations with her husband, and this in effect constitutes another source of *darar* for the wife is deprived of her normal enjoyment of marital relations. Such deprivation in cases where the husband is absent can result in divorce because of fear of temptation (*khof al-fitna*), and this is a serious matter. The *darar* cannot be eliminated unless a reconciliation is accepted by the wife and if such a resolution has not been effected, then one year after the original claim for divorce because of cruelty the wife may be divorced from the husband according to Section 6 of the Circular where arbitrators are used. By the use of brilliant analogical reasoning this Circular assists the woman who is caught between disobedience and resulting lack of support, her allegation of cruelty in the marriage and an inability to either be divorced or obtain a judicial divorce. Such an unenviable state could leave a woman for years still married, but *moalagha*, suspended without rights,

incapable of reaping any of the benefits of marriage including the critical financial support. The Circular allows a woman to free herself from this legal bind by offering what is in effect a ransom (*fidya*) to her husband, who will divorce her or release her if he accepts the payment. The court may assist in setting the amount of the *fidya*. If the husband refuses to accept the payment, the court will act to separate the couple by the use of mediation. In all such cases the court should direct an investigation using appointed mediators whose task it is to attempt to disclose the true source(s) of the disobedience and the alleged cruelty.

Once again the harshness of the one-sided right of divorce by the husband has been tempered in a humane and sensitive way in this Circular. In terms of applied Islamic law in Africa, where Maliki traditions are strongest, I know of no other country where the concept of *fidya* is recognized as a means of obtaining release from marriage. *Fidya* used in this sense is somewhat similar to negotiated divorce (*khula'*) in that payment is made by the wife to the husband, but it is fundamentally different because, unlike negotiated divorce which is by mutual consent, divorce by *fidya* or ransom is engineered from the wife's side.

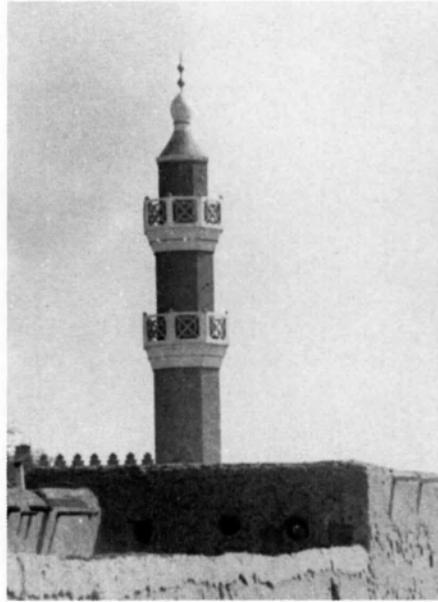
The Circular was issued in the context of certain liberalizing moves ushered in during the early years of the Numieri military regime when reforms favoring the status of women were promulgated. The provisions contained in the Circular followed the reform of *bayt eta'a* and are related to it. Before this Circular the husband could obtain three successive decrees for obedience of his wife, and if these failed to secure her return, he could initiate another round of three obedience decrees, and so on. Until 1977, the date of Circular 61, there was no legal remedy for the wife trapped in this state of limbo, neither fully married nor divorced. Again the law adapted itself, through the established vehicle of change in the Shari'a in the Sudan, the Judicial Circulars, and brought the law more into conformity with the conditions of modern Sudanese life. Incorporating the concept of *fidya*, taken from the antiquity of Islam, whereby a slave could ransom his freedom, into a vehicle for divorce is an ingenious and highly innovative move in which the Sudan is unique.

Cruelty Accepted as a Ground for Divorce in Non-Muslim Communities

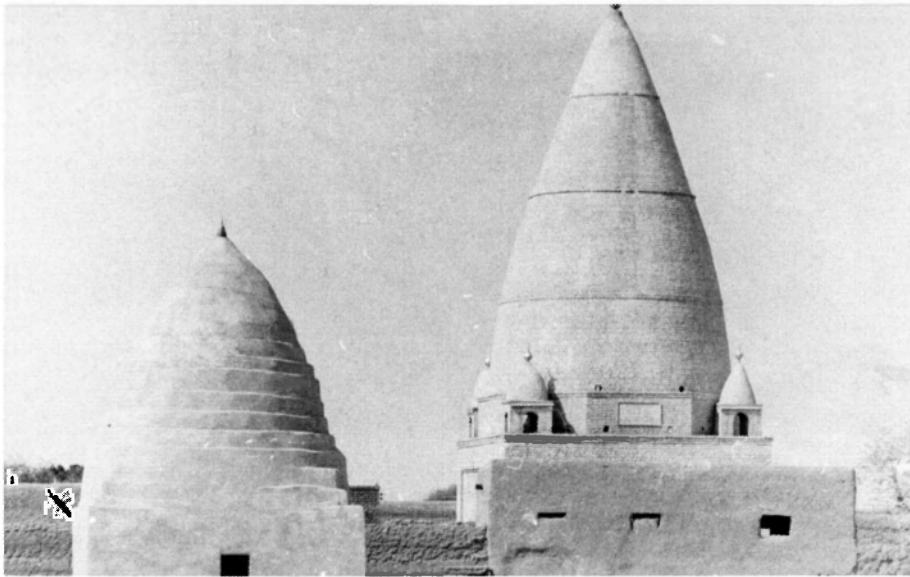
Cruelty, which has existed as a legitimate ground in Islamic divorce since 1916, latterly came to be recognized as an accepted ground for divorce in non-Muslim communities. In the main, the Christian communities mandate strict observance of monogamous marriage and do not permit divorce on any grounds. These constraints have often led to the conversion of the Christian husband to Islam so that he may repudiate



1. Central Mosque in downtown Khartoum.



2. Neighborhood mosque, Tuti Island, Khartoum.



3. Tombs of holy men at Eilafun.



4. Village mosque from an unusual perspective.



5. Left, The Honorable Abul Gassim Abder Rahim, one of the High Court Judges and, right, The Mufti, Hon. Abu-Gusaysa, 1980. Pictures of previous Grand Qadis in the background.



6. The Honorable Sheikh Mohammed El-Gizouli, Grand Qadi of the Sudan 1973–79.



7. The author with women judges, Civil and Islamic, and legal professionals at the Sudan Judiciary, 1979.



8. Bride and groom at a traditional Northern Sudanese wedding.

9. Sudanese marriage, at the center of cultural and social life. Wedding in Omdurman in March 1971.



باحثة أمريكية تقول:-

المرأة السودانية تتمتع بوضع أفضل ..

الجريدة
البحرية

فايزة للهكت

ملكه جمال ٠٠ مديرة للشرطة

« أنا عايزة أياك - بـ
شراء انصافه عمرها ٢٧ عاما
تتوفى الآن في أحد المصحات
الكبرى في روما لتصبح أول
قائدة شرطة هناك ...
وتقوم بصيغتها في انصاف - كما
ماتت - (٢٦ عاما) تشرنابات
معاملة لتصبح ثمانية لها اذا
امتن ...
وكما هو معروف لسان
فرانسيكا ملكة جمال سابقة
كانت قد فازت بمدة القاب في
الماضي ... »



• د • كارولين لويان

• مما يدعو الى
الفكر ان المرأة
السودانية نالت الكثير
من الحقوق في عضون
فترة قصيرة . في الوقت
الذي لاتزال فيه المرأة
في العديد من دول
العالم الثالث تطالب
بالاعتراف بحقوقها
الانسانية في الحياة

انز السموم على خلايا جسم الانسان

تقوم السموم بدمج عند التسمم في جسم الكيمياء الحيوية بخاصة
لحرقها بآراء بعض التجارب لتأثير السموم على عمليات التنفس
التي تحدث في خلايا جسم الانسان
وتقول الباحثة ريتا ان التأثيرات الأولية للتجارب والبحوث
تدور الى ان السموم تحدث بعد التآكل في العمليات الكيميائية لتنفس
خلية الحياة في جسم الانسان وتجرى التجارب الآن للوصول الى
تأثير من السموم التي تؤدي الى تعطيل الخلية الحية .

كتب التفتي لاتحاد نساء السودان يناقش تساؤلات التي طرحها الرئيس القائد

ادرس مكتب التفتي لاتحاد نساء السودان في الاسبوع الماضي
اسم السيد حرم عيسى ، مديرة لجان المرأة بالاتحاد الاشتراكي
والتعاوني وسكرتير عام الاتحاد نساء السودان حيث ناقش في
الجلسات التي خرجها السيد الرئيس القائد في لفته مع قيادات
اه السودان يوم ٢١ أكتوبر برافقته حول دورهم في استقطاب
الفتيات وريبات البحوث والتجارب الاستهلاكية ونسبة الاطفال تشبه
في التوعية بالتملك والتجارب الاستهلاكية ونسبة الاطفال تشبه
توعية في رعاية الامومة والطفولة وتدريب النساء على ادارة التعاونيات
مدار مجلة للطلال والعمل في مجال محو الامية وترقية وتطوير
مؤسسات الريادية والانشاطة مع العمل بها لزيادة من الفرص
للمرأة في المجال الاقتصادي وخلق ريادة فكرية حرة .
مع لخصي المرأة وخلق اطر عمل ليعمل التنظيم في موارد
على عضوية ...
وقد قام المكتب لاتحاد نساء بالرد على جميع هذه التساؤلات
في ارفع مذكرة بهذا الشأن في اذاعة الشؤون السياسية والتنظيمات
في الاسبوع القادم ...

10. The author interviewed in the Khartoum daily, *Al-Ayyam*, comparing the status of women in America and the Sudan.



11. 'Ulama from Sudan and Egypt, discussing legislation which may lead to an Islamic constitution in the Sudan.



12. Political rally in the southern Sudan with northern and southern women attending, circa 1971.



13. President of the D.R. of the Sudan Jaafar Mohammed Numieri (left) with the Chief Justice, Dr Khalifalla el-Rashid, 1979.



14. Fatma Ahmed Ibrahim, Leader of the Sudanese women's movement and first woman Member of Parliament, 1966.

**SAVE
THE LIFE
OF SUDANESE
WOMAN LEADER
FATIMA AHMED IBRAHIM !**



15. Joseph Garang, southern Sudanese leader executed by Numieri in 1971 for alleged conspiracy against the regime. Islamization in 1983 became a rallying cry for southern opposition to Numieri.



16. National Reconciliation between Numieri and UMMA party leader, Sadig al-Mahdi.



17. Wives of Anwar Sadat and Jaafar Numieri symbolize unity and diversity of Nile Valley.

his wife, or even the conversion of the Christian woman, whose new status as a Muslim wife prohibits her from being married to a Christian man. After the landmark case of *Bamboulis vs. Bamboulis* (1954), divorce in the so-called excepted communities was governed by the general civil law of the Sudan and not by the personal law of the community in question (case reported in SLJR, 1960: 199). Since that time cases from the Greek Orthodox Church and from the Coptic Christian community have arisen where the question of cruelty is at issue in the divorce.

In one case the wife alleged repeated beatings which resulted in minor bodily injuries and yet legal cruelty was not irrefutably established since the civil law definition applied to 'an act which has caused injury to health' (case reported in SLJR, 1959: 85). In this case the civil court confirmed cruelty in the marriage and stated that the wife was justified in leaving her husband's house and awarded the woman alimony and custody of her infant daughter. She had not petitioned for divorce.

In another case involving a Greek Orthodox husband and wife, on appeal, the High Court granted divorce and alimony to the wife on the basis of proven cruelty in the marriage (case reported in SLJR, 1960: 200). According to the High Court judges cruelty was abundantly proven in that the husband had publicly insulted the wife on a number of occasions, in one instance announcing at a public gathering that if his wife should give birth to another child it most certainly would not be his child. Two doctors testified that the wife was in a state of nervous exhaustion due to this unhappy marriage. The judge made an independent investigation into the matter of child custody and concluded, after visiting the house of their mother where they were living and speaking with the children directly, that their interests were better served if they remained with their father. However, the divorce and alimony aspects of the petition were confirmed, with the alimony to be paid from the date of the departure of the wife from the matrimonial home. An interesting contrast between the Civil law and the Shari'a is evident here in that the woman is entitled to support payments from the date of her departure from her husband's house, while the Shari'a disallows payment of support during the time that a wife remains outside of the conjugal home without being divorced.

Divorce for Lack of Support

In the chapter on marriage it is stressed that maintenance of a wife and the members of a family is a duty for the upright Muslim male and a matter of personal pride and honor. In what could be termed traditional Sudanese society, failure to maintain adequately and properly one's

family was a source of disgrace and would have occurred under tragic or unfortunate circumstances. In today's society failure to support one's family is still shameful, but changes in the society brought about by emigration and the breaking apart of the extended family have made cases related to *nafaqa* or maintenance the most numerous seen before the Shari'a courts, with the exception of inheritance cases.

Claims for judicial divorce because of lack of maintenance or lack of adequate support are usually a final step taken by a wife after she has exhausted every route to obtain *nafaqa* from her husband. If the husband is present and is living with the wife, she may claim that he squanders his money on alcohol or beer or recreation with his friends to the neglect of his family. More common in these days of economic hardship is the situation where the husband has left the Sudan to find employment in one of the oil-rich states, especially Libya, Saudi Arabia and Abu-Dhabi. The husband may be away for a number of years, may make infrequent visits home and may not supply regular maintenance payments. The law makes very specific provisions for the procedures to be followed in pursuit of *nafaqa* funds from the absent husband and also the husband with whom the woman is cohabiting. Circular no. 17 (ca. 1915) sets out in detail the valid circumstances in consideration of which a woman may be divorced for non-support. Proof of non-support is made through the testimony of the wife and her witnesses or by admission of inadequate support by the husband. In cases where non-support is shown, the judge may elect to give the husband two months to secure the needed funds – after two months, if there is no change, divorce may be pronounced. The woman is thus entitled to divorce from a husband who has become indigent, presuming he was not so at the time of the marriage. I have seen cases where the wife came to court complaining of non-support; the judge ordered, say, £S20.00 a month *nafaqa* until the 'idda period was passed and the husband indicated he had no money whatsoever. The judge has no recourse but to divorce the woman and hold the husband in arrears of his *nafaqa* responsibilities.

For the husband who is absent from the wife the rules differ according to whether his exact whereabouts are known. If his address is known and he can receive a summons, the judge will allow him 30 days to appear before the court and respond to the charge of non-support. If the husband does not appear in that time and no support has been received, then the judge will divorce the wife after she has sworn under oath that her absent husband has left no money with her for support (Circular no. 17, section 3). For the husband whose whereabouts are not known and therefore cannot be summoned to court, the judge will order an investigation using relatives and friends to gain some knowledge of his current residence and status. If his absence is confirmed and the wife

swears that he left her nothing for support the judge will wait one month and then divorce her (Circular no. 17, section 4). The same Circular cited in the above instances of divorce for lack of support also sets a period of four years from the end of a court investigation about a missing husband who has left some funds for maintenance as the waiting period before the husband can be declared legally dead (section 10). The wife then passes the four months and ten days 'idda period for a widow ('idda wufa') and she is free to marry again. If the husband returns she is obliged to go back to him in all circumstances except that she has consummated marriage with another husband (section 12). As a general rule, divorce for non-support is clear if the husband has deserted or apparently deserted the wife, but divorce as a rule need not be granted because of insufficient support. Section 8 of this definitive Circular on divorce for non-support states, 'If the husband is able to feed his wife, even at a low standard, and to clothe her even at a low standard, then she cannot be divorced'. Further, the collective aspect of Islamic law is underscored in the rule that a woman also cannot claim a divorce for non-support if a member of the husband's family comes forward and offers to maintain the wife (Circular no. 17, section 6).

The current wave of divorce cases because of non-support stem, for the most part, from the economic stresses which have been a feature of life for the Sudanese during the decade of the 1970s and into the current period. A corollary to the internal economic difficulties has been the large out-migration of Sudanese males, many of whom are married, to the more lucrative jobs in neighboring oil-rich Arabian countries. Occasionally support payments are not forthcoming, and currency problems may compound this, leaving wives without support and ultimately having to seek legal recourse to obtain their legitimate rights to support. Such cases were alluded to in Chapter 5 in the discussion of *nafaqa* and marriage, and will be discussed more fully in the following chapter dealing with the Islamic legal conception of support in its broadest terms.

Talaq al-'ayb – Divorce because of Disease, Defect or Impotency

A contagious disease or physical defect, provided that the disease or defect did not become known until after the marriage, has been an undisputed ground for legal separation of a man and wife in the Shari'a generally. Typically the wife raises the complaint. Beyond this *al-'ayb* encompasses insanity and impotency in the husband as grounds for judicial dissolution of a marriage. Insanity can usually be readily demonstrated, but a judgment of impotency requires that regulations be imposed to insure the accuracy of the claim. The following case

illustrates the caution which the court exerts when impotency is alleged by the wife and a judicial divorce is sought:

A woman initiated a suit for divorce in Khartoum North District Court asking for a decree of divorce because of impotency. She said she had been married for two years and had not had intercourse with her husband during that time. She stated she had been a virgin at the time of her marriage and was still a virgin. The woman was sent by the court to the gynecology section of Khartoum North Civil Hospital and after a medical examination, was pronounced still a virgin. The husband responded that he was fulfilling his duties as a husband, but that she was in a state of disobedience, having left his house. The woman had one witness who testified that she had complained to him that her husband was not performing his sexual duties.

The court adjourned the case for one solar year, from 9 May 1972 to 9 May 1973. After the year elapsed the wife returned to court stating that no sexual intercourse between the couple had occurred during the year. The court summoned the husband who responded that the wife had for the last two months refused to cohabit with him. The wife admitted this saying that the house had no furniture: the husband retorted, that is because the wife took everything with her. The court then told the husband that since there were no effects in the house, the wife was not bound to cohabit with him. The husband was asked if he would divorce the wife and he refused. The court then gave the wife the option of an irrevocable divorce which she accepted.

The husband appealed this decision before the Province Court claiming that the wife, by not living with him for the past year, had not enabled him to cohabit with her. The wife countered that she have lived with him for two years and they had not ever had sexual relations. The Province Court overturned the divorce of the lower court.

The wife appealed to the Shari'a High Court which upheld the decision of the Province Court for the following reasons: the law provides that when impotency is alleged, whether the husband admits this or not, the court should direct the couple to cohabit for one lunar year. The days the wife spends away are not counted as part of the year. The lack of furniture in this case is a handicap, but not a barrier to having sexual relations, for all that is required is a place of seclusion. Thereby, the High Court directs the couple to cohabit for one lunar year, after which the case may be reviewed again.

(Shari'a High Court Cassation Decree No. 100/74; Judges Presiding: Sheikh al Sidiq Abdel Hai (President), Sheikh Mohammed al-Sanousi Ibrahim, Sheikh Hanafi Ibrahim Ahmed)

This case is not a simple one and, although I do not have a large sample of cases of *talaq al-'ayb*, it is clear that the courts move with great caution in this sensitive area. Sexual potency in a man is as serious a matter as honor and chastity in the behavior of women, and the term '*ayb*' is used colloquially in Sudanese Arabic with reference to any shameful act. Children are reprimanded with the harsh words '*La, 'ayb*', 'No! this is shameful', and adult behavior which people refer to as '*ayb*' is thus subjected to the severest criticism.

In the foregoing case, despite the mitigating features in the wife's favor of having cohabited with the husband for two years and then attempting another period of cohabitation but in an inadequately furnished house, the court nevertheless ruled that impotency in the husband had not been conclusively shown. The burden of proof is on the wife who is making the accusation and requesting divorce. Her failure to cohabit with the husband for the one lunar year's probationary period failed to prove to the court beyond a doubt that '*ayb*' or impotence in the man was shown as a ground for divorce. After the full year's cohabitation, the wife is free to raise the claim of impotence again in a fresh case. It is the inability of the law to prove impotence by the traditional use of witnesses that has made the year's period of cohabitation an essential part of the proof of impotence.

One judge disagreed with this method in a case of alleged impotence which I observed. A young woman of about 18 years complained to the court that she had lived with her husband for five years and he was impotent. As is customary procedure, the court ordered a medical examination for the woman to show that she was still a virgin. In this case the medical report from Khartoum Hospital indicated that the source of the problem was with the woman.² The law provides that after a complaint of impotence is lodged by the wife, a period of one year's cohabitation must elapse to enable the couple to have sexual relations and possibly for the wife to become pregnant. When I discussed the case with the judge, he related that he saw approximately three such cases per month. He indicated that he was frustrated by the provisions in the law when medical science has determined the cause of the sexual difficulty in the marriage, as in this case. He had consulted with the Province Judge and Head of Khartoum Court, suggesting to him that a simple resolution would be to get permission from the husband for the necessary operation to be performed on the wife. The woman had

come to court alone, so the judge scheduled another session where both husband and wife would be present. It was clear that the judge would try to find a legal remedy aside from the required one year's cohabitation. If the wife rejects the medical opinion or if they reject the recommended operation, the court has no choice but to order the one year period of cohabitation.

Hanafi law says that a woman can obtain a divorce because of a physical defect in her husband, but not the reverse, that divorce is sanctioned because of a defect in the woman. The Maliki interpretation, which is followed in the Sudan, accepts divorce of a woman because of a physical defect, provided that it is proven conclusively with women witnesses, according to Sheikh al-Gizouli.

Divorce for Lack of Consent to Marriage

Since the law regarding guardianship and consent in marriage was liberalized by reinstituting the Hanafi provisions over the Maliki, the number of cases of women claiming lack of consent in marriage has increased. Since the reform in 1960, a number of legislative checks have been instituted which prevent a false claim of lack of consent from being lodged. Consent express or implied, acceptance of *mahr*, cohabitation and the birth of children are certain indications of consent.

The woman must prove with witnesses in court that she did not consent to a marriage. She must show that she was married by compulsion against her will by her marriage guardian. According to Circular no. 54 (1960), the silence of the virgin at the time of the proposal of marriage and thereafter is an indication of consent, and it is not a valid claim for the wife seeking divorce because of lack of consent to say that she was ignorant of this fact. If the marriage contract was made by the guardian without her knowledge and therefore without the possibility of her consent, the contract may be cancelled or the woman has a legitimate claim for divorce. If, however, the contract was made without her knowledge or consent, but she accepts the marriage by cohabiting with the husband, then she will have no valid claim of lack of consent. According to the explanatory note which was issued 12 years after the reinstitution of Hanafi law regarding consent in 1972, the woman must prove one or more of the following: that she refused the proposed contract of marriage, that she refused to accept her rights in *mahr* and *nafaqa*, that she resisted being removed to her husband's house and the consummation of the marriage itself. The burden of proof of lack of consent rests with the woman as the party who is raising the claim.

Lack of consent to the marriage is likewise a valid ground for having a marriage annulled (*faskh nikah*) which was discussed in chapter 5.

In terms of future prospects for marriage it is better to have the marriage annulled than to seek divorce for the social stigma is much less in the former instance.

. Conversion or Apostasy from Islam as a Means to Divorce

The Sudan is a society of many cultures and religions. According to the Shari'a a Muslim man may marry a non-Muslim woman, provided that she is a *kitabiyya* or from one of the religious traditions which has the Bible as its religious book. A Muslim woman, however, cannot be married to a non-Muslim man as this is a violation of the principle of *al-kafa'a* or equality of standard in marriage which requires a woman to marry a man equal or superior to her in religious and social standing.

What are the possibilities here and what are their socio-legal ramifications? If a man apostates from Islam or if he is declared an apostate from Islam,³ he is *murtadd* which is an offense of treason in Islamic polity (Asaf A. A. Fyzee, 1964: 169). In such cases, his marriage with a Muslim woman is instantly dissolved. If a Muslim wife renounces Islam, she may convert or return to a previous adherence to Christianity or Judaism and in such cases the marriage is not dissolved. This could well occur in the situation where a Christian or Jewish woman has converted to Islam in order to please her Muslim husband. If a woman renounces Islam and converts or returns to a 'pagan' faith, a possibility in areas of the Sudan where animist religions exert a strong influence, then the marriage is dissolved, for a Muslim man cannot be married to a 'pagan' woman. Both of these theoretical possibilities are nonetheless quite rare in fact since formal renunciation of religion is rare itself.

Far more realistic and indeed more common is the use of conversion to obtain a divorce, particularly for the non-Muslim minority groups in the Sudan. Christian men may convert to Islam in order to obtain the divorce which is forbidden under their personal canon law, and Christian women might convert to Islam so that their unhappy marriage might be dissolved. The following case heard before the Civil High Court had to decide the proper area of jurisdiction in a case of divorce where the Christian husband had converted to Islam:

The husband and wife were both Coptic Christians and were married according to Coptic Orthodox personal law. One year later the husband converted to Islam and purported to make a declaration of divorce in accordance with the Shari'a. The wife then appealed to the Civil Court for divorce, but the Province Judge rejected the claim saying that the competent court having

jurisdiction was the Shari'a Court because of the husband's conversion to Islam. The case was heard in the Civil High Court on appeal and it decided that the correct court for the case to be heard in was the Civil Court.

(AC/APP/5/1957, Farida Fouad Nakkla vs. Sameer Ameer, reported in *Sudan Law Journal and Reports* 1957: 21-3.)

The High Court decided that the competent court was the Civil and not the Shari'a Court on the ground that the Mohammedan Law Courts Ordinance of 1902, which outlined the basic structure and jurisdiction of the Shari'a courts, will only hear cases of divorce where the marriage was concluded according to Islamic law. This ruling erected a dissuasive barrier to the use of conversion to Islam for the sole purpose of divorce, but it did not put an end to repeated attempts by men of orthodox Christian background to divorce their wives by using what appears to them as an ingenious method. The courts, both Shari'a and Civil, frown on such legal chicanery and refrain from recognizing divorces conducted in such a fashion.

The question of the competent court to try a case of divorce which involves contradictory elements of the religiously and legally plural Sudan is often the first issue to be decided before the merits of the case are tried. Most potential conflicts have been worked out in the separate jurisdictions allotted to the Civil, Shari'a and Customary courts which were originally set forth during the early years of the colonial administration and have not as yet been basically altered. A case like the following raises these issues:

An Arabized Southern woman came to court claiming that the civil courts would not hear her case for divorce because she had been married according to her customary law. The Shari'a judge also refused to hear the case, because the parties to the case were not Muslims and so far they had not agreed to be bound by Islamic law. The woman was therefore locked out of the two court systems which function in Khartoum. Some time later she returned to the same court with her husband and announced that she had converted to Islam. Her conversion was confirmed with witnesses and the husband was given the choice of converting to Islam or being divorced from the woman. The husband refused to convert and so the judge pronounced them divorced.

(Observed in Khartoum Second Class Court, 13 December 1979).

Southerners resident in the North often have a difficult time litigating matters of personal status law because they are bound by customary law. This woman was forced to manipulate the dual legal system operative in Khartoum in order to achieve the desired legal effect. There appears to be a certain amount of confusion arising in this situation and I have been told by several Shari'a judges that litigants often come to the wrong court. If the judge suspects this he will ask the couple whether they are Muslim or whether they agree to be bound by the Shari'a as the law provides (Mohammedan Law Courts Ordinance, 1902). Otherwise the law is open to manipulation, as in this case, where the impractical alternative would be for the southern couple to return to their home to litigate the case. Conversion is then a reasonable choice to effect the legal remedy, in this case divorce, according to the Shari'a.

Ila and Zihar

Ila and *zihar* are both ancient pre-Islamic forms of divorce which have no practical relevance in the Sudan today. *Ila* means 'oath' and in this form of divorce the husband swears '*wilah!*', that he will not have sexual intercourse with his wife for four months, and after this time, according to Hanafi law the divorce takes place and is irrevocable. The Maliki interpretation of *ila* is that the divorce is revocable and if he resumes intercourse with his wife during the four month period, he must perform a penance of feeding the poor, freeing a slave or fasting for three days.⁴ Sheikh Mohammed al-Gizouli, an experienced judge and jurist, reports that he is not aware of a single case of *ila* in the Sudan, and it is included here more as an indication of historical conditions in the Jahiliya, or the time before Islam.

Zihar falls into the same category of being obsolete and a matter of historical curiosity. Here the husband insulted the wife with the expression '*Inti gazara izay ummi*' – 'You are like the back of my mother' (or the sister could also be named) and this was tantamount to saying that the wife was forbidden to the husband. This was a serious offense and was considered *haram*. Before Islam the expression signified divorce – Islam made it a punishable offense. If his intention was to divorce, then an irrevocable divorce was the result, but the penance for *zihar* must be performed and consisted of fasting for two months, freeing a slave or feeding the poor. If the husband did not perform the penance, then the wife could refuse to cohabit with him.

HARMONIOUS OUTCOMES TO BROKEN RELATIONS
IN MARRIAGE

As we have seen, there are a number of means to either effect a reconciliation in a troubled marriage or bring about divorce in as amicable a fashion as possible. These include marriage arbitration, *khula'* and *mubara'a* (divorce by mutual consent), and divorce in consideration of some property using a novel way, the concept of *fidya*. Divorce is never smooth and ill-feelings on both sides and in both families are apt to run very high.

Islamic law and traditions provide some means to ease or make less unpleasant the difficulties that occur in marriage. *Al-radwah* is a sum of money or something of value which is paid by the husband to the wife after a serious quarrel between them. Traditionally this was ordered by the Lineage Council of Elders who meet in a *mejlis*, or council to decide how best to resolve the conflict between husband and wife. What they decide is enforceable, theoretically, by a Shari'a court, and thereby if the husband fails to make the appropriate payment, the wife may raise a case against him. Anderson (1955: 373) adds that *radwah* is a gift given by a husband as compensation to the wife when he takes her back after a revocable divorce. This is commendable but not enjoined by the Shari'a. It is reported that it is customary among the Mahas of Tuti, and no doubt elsewhere, for a *radwah* or present to be given to the first wife when the husband takes a second wife. The specific occasions on which the *radwah* may be presented might differ, but the essential feature of the *radwah* is to soften the harsh feelings which exist when there is the potential of or the fact of a serious dispute between husband and wife.

Al-mota'a, divorce present, may be given when there is divorce but the wife is not entitled to *nafaqa*, as is the case before the consummation of marriage. This may also be given to the wife where no specific dower has been agreed upon. In both cases, it is voluntary and not compelled by the law.

CONCLUSION

From the standpoint of the woman, divorce is not a desirable option. She will be left with support only during her *'idda* period and she may have to relinquish the custody of her children to their father or quarrel with him over their support. It is rare that a divorced woman has a 'second chance' and will remarry in the Sudan. From the woman's side, divorce must be viewed as a desperate final act where she sees no other remedy to her difficulties.

For the man, the social stigma is not so great, but he may well suffer the financial inability to marry again. He will also temporarily lose the custody of his underage children and may face a court battle in the future if his wife constructs a good case for retaining custody of the boy after age seven and the girl after age nine, as the Maliki law provides. If the divorce was judicial and was obtained in court by his wife proving cruelty or non-support or the flaw in the man which are subsumed under *talaq al-'ayb*, then the reputation of the man is suspect and his chances for a good second marriage may be affected.

I stress again the fact that divorce is an extremely serious matter; it is not taken lightly nor has it become more socially acceptable as in the West. The apparent relative stability in the divorce rate in the Sudan, at 28 per cent over the last thirty years, indicates that it is a continuing source of tension in the society, but is much less common than in comparable societies. The divorce rate is not the simple indicator of marital stability or instability that it might appear to be and it is complicated and complemented by the rise in cases dealing with maintenance and obedience, other indicators of basic tensions in marriage. What the divorce rate does indicate is the number of people in a given year who have lost all hope and exhausted all means of reconciling a broken marriage.

NOTES

1. Cf. *A Dictionary and Glossary of the Koran, Arabic-English*, John Penrice, 1873: 108.
2. Although not specifically stated in this case, often a tightly infibulated woman is not able to successfully have intercourse with her husband until she is 'opened' surgically by a midwife or doctor.
3. For example, Mahmoud Mohammed Taha, founder of the Republican Brotherhood and Islamic reformer, was tried by the Shari'a High Court in 1968 for his beliefs, his writing and agitation and was declared *murtadd*, or in a state of apostasy from Islam. He was later executed by the Numieri regime in 1985.
4. Three days' fasting is the normal punishment for perjury.

CHAPTER SEVEN

THE MAINTENANCE OF WOMEN, CUSTODY AND SUPPORT OF CHILDREN

NAFAQA – THE MAINTENANCE OF WOMEN AND CHILDREN IN TIMES OF ECONOMIC STRESS

As was discussed in Chapter 5 on marriage, *nafaqa* encompasses primarily the husband's responsibility to provide food, clothing and lodging for his wife and children. *Nafaqa*, which is a fundamental responsibility of the husband and father, becomes a legal concern in the dissolution of a marriage where it is contended that the husband is not providing adequate support during the course of the marriage. The cases involving *nafaqa* which have already been cited are of this latter type.

A secondary set of obligations arises between a person who has means and another who is indigent (Asaf A. A. Fyze, 1964: 202), and this may or may not involve familial relationships. One of the learned scholars of Islam with whom I spoke in the Sudan commented that obligations of *nafaqa* extend to the maintenance of gardens and other income providing property so that continuous, proper support is ensured (interview with Mohammed Musherif, 22 January 1980).

In legal practice the obligation to maintain families is enforced in the Shari'a courts, but the moral injunction adequately to support one's dependents is also strongly sanctioned by the society. It is this interplay of social and legal sanction which is apparent in the analysis of *nafaqa* in the Sudan.

Frequency of Nafaqa Cases

Cases involving maintenance and support have become the most common type of complaint heard before the Shari'a courts in the Sudan. They are exceeded in number only by inheritance cases, which as a rule are not contested. In the Shari'a courts in the three towns, Khartoum, Omdurman and Khartoum North, the number of *nafaqa* cases represents approximately 20 per cent of the total number of cases in process during a given six month period. For the entire Sudan cases involving *nafaqa*

outnumber by almost two to one the next leading contenders, which are divorce and obedience cases (see tables 1 and 2 below).

Statistics for the period 1969–71 show a similar frequency of *nafaqa* cases, with 10,417 for the same one year period in 1969–70 and a figure of 12,031 *nafaqa* cases in 1970–71. So in absolute numbers the gross figures appear not to have changed significantly in the ten year period between 1969 and 1979.

TABLE 1

Work of the Shari'a Courts, 1 January 1979 to 30 June 1979, the Three Towns

	<i>Cases in Process</i>	<i>Nafaqa Cases</i>
Khartoum	1122	198
Omdurman	1972	250
Khartoum North	1012	229
Total	3406	677

TABLE 2

Frequency of Selected Cases for the Entire Sudan 1 July 1978 to 30 June 1979

Child custody (<i>hadana</i>)	Obedience (<i>ta'a</i>)	Maintenance (<i>nafaqa</i>)	Divorce (<i>talaq</i>)
2491	6404	10,158	6585

(Statistics courtesy of the Department of Statistics, the Sudan Judiciary)

Labor Migration as a Contributing Cause to Nafaqa Cases

However, the awareness of *nafaqa* as a growing social problem has been acute in this ten year period, tied as it is to the ever-increasing number of Sudanese males who are emigrating to the oil producing countries in the region for employment. It has been estimated conservatively that about five per cent of the total Sudanese labor force is working outside of the country (Jalal Eddin, 1979) in the countries of Saudi Arabia, Libya, Abu-Dhabi, Bahrain and the other Emirates. Dominantly the migrants are males in the age category of 20 to 39 years, that is men likely to be married with families.

In 1980, statistics from the Passports, Migration and Nationality Department indicate that 34,748 exit visas were issued to Sudanese nationals already working in Saudi Arabia. This figure constituted

30 per cent of the total number of exit visas issued for that year (Mahgoub al-Tigani, 1982).

It is of course impossible to say what number of emigrating males are involved with the relatively large number of *nafaqa* cases. It is true that many men stay away for long periods and the regularity of communication and degree of support vary. Also, sometimes the entire family may emigrate to the place of work, but while this is the preferred option, it is not always an attainable goal. The social fact of large numbers of men in their prime leaving their families, drawn to foreign countries by the appeal of higher salaries, is having a major impact in Sudanese society. With the father—husband absent the position of the mother—wife is strengthened in nuclear families. In the more common patrilineally extended families, the wife and children may come under the protection of the husband's family, especially his father or brothers, or the woman, with her children, may return to her family, usually her father's house. Whatever the social arrangement worked out, the husband—father is nevertheless *primarily* responsible for the maintenance of his wife and children. Thus the law does not recognize any notion of corporate economic responsibility to be assumed by the husband's consanguineal kin with respect to his affinal ties. Even if the wife was living with his kin in his absence the payments of *nafaqa* would be made to the wife directly.

The rules which apply in *nafaqa* cases where the husband is absent were outlined in the important Circular no. 17, issued about 1916. In cases where the wife complains of non-support the allegation is confirmed through the normal procedure of the testimony of witnesses. Once a determination that the wife is entitled to *nafaqa* has been made, the court will determine whether the husband has any property in the country from which maintenance for the wife could be taken. This could be clothes or personal belongings left by the husband or a form of immovable property, such as a house or parcel of land (Circular no. 17, section 1). This is the most common resolution of *nafaqa* cases by the court.

In cases where the husband is absent and has not been supporting his wife and his whereabouts are unknown, therefore he cannot receive a summons from the court, the judge may divorce the woman and after the *'idda* period she is free to marry another (sections 4–5). However, if the husband is located and he is able to feed and clothe his wife, even at a low standard, then she cannot be divorced (section 8).

When the husband has been absent from the wife for a long time, but has left some funds to maintain her, yet the husband's whereabouts are unknown, the court will make an inquiry independently regarding the husband's location. When the inquiry has not yielded any information

about the husband, the judge will ask the wife to wait four years and if during that time no word is received from him, the court may declare him to be a missing person and recognize him legally as a dead person. The wife then passes through the 'idda period for a widow (*'idda wufa'*), after which she is free to marry (section 10). If the husband returns after the four years, the wife must go back to him even if she has completed the 'idda period, the only bar to this being her having consummated marriage with another husband (section 12).

The social implications of husbands who are absent for extended periods of time can at times be catastrophic. The following, while not typical, illustrates the difficult situation in which a woman, who is not accustomed to supporting herself, is placed by the prolonged absence of her husband:

A woman came to court requesting divorce because of non-support from her husband who has been living in Saudi Arabia for 15 years, she claims. During that time she admitted sharing a bed with another man in order to get what she needed to survive. The judge lectured her for immoral behavior, saying that she should have come to court before this and obtained a divorce because of 'fear of temptation' because her husband left her without support, or that she should have found other ways to support herself. The woman, visibly moved by the judge's words, said she did not want to pursue the case further, that she repented of her actions and would improve her life by seeking employment and self-sufficiency.

(Observed in Khartoum Second Class Court, 2 December 1979)

The judge in this case commented to me that there are now so many women who are left without support by their husbands that he does not hesitate to divorce a woman who shows that she has been without maintenance for three to six months. 'Our morals are deteriorating and adultery is increasing because of the current economic hardship', he lamented.

It was a recognition of the social hardship placed on women by absent husbands that was responsible for the early introduction into Islamic law in the Sudan of judicial divorce granted to women because of fear of temptation into adultery (*talaq khof al-fitna*) (in Circular no. 17, section 13). Such a divorce may be granted to a woman who requests it in the context of a husband who has been absent for a year or more. This is possible regardless of whether the husband's whereabouts are known, or whether he has been supporting his wife. Upon such a request the judge will contact the husband, if his location is known, and inform him that if he does not return to his wife or take her with him she will

be divorced from him by the court. The inspiration for this interpretation of the law is the recognition both that the woman is harmed by being denied a normal marital life, and that the divorce is a legitimate means of protecting the woman (and society in general) from having its morals corrupted by economic need. In court *khof al-fitna*, the fear of temptation, can only be established by the woman herself swearing to this by oath. The oath, once made, is sufficient for the judge to divorce her. Such a testament in court is, of course, difficult and is shameful to the degree that it involves an admission of a woman's sexual needs. In the context of Sudanese Muslim society, the need is more often material rather than sexual and the catalyst to 'temptation' is the fact that a woman is left alone without means of support.

For the middle class, educated woman finding employment is possible in clerical and government ministries and such work is socially accepted and not stigmatized. Poorer women may look for 'respectable' unskilled work such as domestic service or hospital aides but they run the risk of placing their good character in jeopardy in the eyes of society. Very poor women traditionally have earned some income by brewing and selling the indigenous beer *merissa*, but this is completely disreputable work because of the illegality of this activity. The harshness of recent economic times has pushed the official figures for women in the work force (i.e., non-agricultural work outside of the home for wages) from three per cent in 1973 to seven per cent in 1979 and the trend continues toward further increase. Still the fact remains that a very small percentage of women work outside of the home for wages and are therefore capable of a certain degree of self support and maintenance of their children. The vast majority of women depend on their husbands, if they are married, or their fathers or other male agnates for economic support.

Internal Economic Stress as a Contributing Cause

The same economic crisis which has caused large numbers of Sudanese laborers to migrate abroad is also placing stress on society and the family at home. Not surprisingly the economic pressures that are inducing women to join the labor force are also responsible for many men, husbands and fathers, having to have two jobs. Many of Khartoum's ubiquitous taxi drivers today are driving the car as a second income and therefore working 12 and 16 hour days. The chronic and overriding petrol shortage ensures that this is a part-time job. The annual inflation rate is over 50 per cent, and the cost of nearly every basic commodity including meat, fruit and vegetables, flour and petrol has more than trebled or quadrupled in the last decade. In one of the worst cases the cost of a kilo of meat had risen by 1980 to ten times what it was in 1970.

Transportation has become a daily source of stress in urban living with the services provided woefully inadequate, the result being long queues and occasional outbursts of fighting to board a public transport vehicle. Meanwhile wages generally have been held down and the inability of workers to keep pace financially with the rate of inflation has meant an unprecedented number of strikes in recent years, among traditional strongholds of organized labor such as the railway workers and Gezira tenant farmers, but also recently among white collar and professional workers such as bank employees and government physicians (*Sudanow*, September 1979). An increase in the government regulated cost of petrol and bread in 1979 brought about widespread demonstrations in the Sudan's major urban centers which forced the price down again. It was the same price rises in March of 1985 that led to the demonstrations and general strike that provided the context for the overthrow of the Numieri regime in April of the same year.

In any society one of the most sensitive barometers of economic stress is the breakdown of familial relations, especially seen with the incidence of divorce and support cases in the courts. Given the complex and highly controlled nature of divorce in Islamic society and the strongly endogamous character of Sudanese marriage which tends to stabilize the institution, it stands to reason that stress on the family will occur at other pressure points. I would suggest here that a high incidence of *nafaga* cases is a significant indicator of social-familial stress in Islamic society where divorce is constrained. In the urban Sudan, where maintenance cases account for one-fifth of the total number of active cases before the Shari'a courts, the question of the maintenance of women and children becomes an important socio-legal problem. The divorce rate for the Sudan is estimated in this study at 28 per cent which is relatively low when compared with other Muslim and non-Muslim African societies. Thus, I would argue, an explanation of the difference is the relatively higher number of maintenance problems in the Muslim Sudan.

Nafaga cases are particularly shameful since an accusation of non-support or inadequate support by a wife is a direct assault on one of the primary social as well as legal responsibilities of a man, to support his family. It is an affront to his manliness and his pride as well as his finances. The inability to provide is unfortunately viewed as an inadequacy of manhood or masculinity. To a large extent the shame falls on the extended family of the man as well for the implication is that they have not come to the aid of their relative in need. The social disgrace associated with *nafaga* cases is sufficiently strong that certain communities are proud that their record is clear of such cases. The people of Tuti island, an encapsulated Nubian community in the center of the

three towns, point with pride to the fact that there has not been an official complaint of non-support involving island people in recent memory. Tuti island stands as the exception to the increasingly common problem of the maintenance of women and children.

The effect of inflationary increases on the cost of living is evident in the following cases:

A woman who has been divorced from her husband for some time has been receiving the maintenance payments for her two children to which she is entitled. The previous award made by the court of £S15.00 per month is under consideration with the woman requesting a £S10.00 per month increase.

The husband, who is a taxi driver, agrees that with inflation she needs more money than the £S15.00. But he thinks that £S25.00 is too high. The judge orders the former husband to pay £S21.00 a month to support his children and the woman accepts this, a middle ground having been struck between the current payment and her demand for an increase.

(Observed in Khartoum Second Class Court, 29 November 1979)

Nafaqa payments are enforced by the courts and the husband may pay the wife directly, or he or the former wife may request that the monthly sum be taken from his salary by his employer. By law the amount of the *nafaqa* payment may total up to one-quarter of the man's salary, as a result of reforms brought by agitation from the Sudanese Women's Union.

Nafaqat al-'idda – Maintenance During the 'Idda Period

A husband is obliged to maintain his wife, after he has repudiated her or she has obtained a judicial divorce, whether the divorce is revocable or not, until she has passed three monthly courses and it is determined that she is not pregnant. *Nafaqa* is owed to the wife whether she is Muslim or not, rich or poor, and whether or not the marriage has been consummated. The obligation to support begins at the time of the marriage contract (*al-'agid*). As long as a wife remains in her husband's house she is entitled to *nafaqa*. 'Disobedience', or leaving the husband's house, means that the wife forfeits her right to maintenance. A wife who is divorced while she is pregnant is entitled to full maintenance during the course of the pregnancy, through the period of lactation and until she has resumed menstruation and three monthly cycles have passed. In the Sudan infants are normally breastfed for up to 18 months so that a pregnant and lactating woman may actually receive two years

or more of maintenance after her divorce. According to Hanafi law a divorced wife who believes she is pregnant or has been missing her monthly periods is entitled to *nafaqa* for up to two years – if the claim is false and the wife actually completed the *'idda* the husband is permitted to recover the payments made unjustly.

The *'idda* waiting period and divorce are bound together and the divorce is not complete, nor is the woman free to marry another until the *'idda* requirement is satisfied. *Nafaqa* is also bound to divorce and *'idda*, in that maintenance of a wife is a man's responsibility until she has finished her *'idda* waiting period following divorce. The following case illustrates the complexities that may arise when the divorce itself, upon which all hinges, is questioned:

A husband and wife appeared in court together and the husband was angry with the court because the judge ordered the case to proceed even though the husband's lawyer had not shown up. The wife was claiming *nafaqa* for the *'idda* period she spent out of his house after, she claimed, the husband had divorced her. While she was pregnant, she testified, he told her, 'I don't want you, go with your brothers', which she took as divorce, although in the law this is only implied divorce. After he said this she went away, completed her pregnancy, gave birth and some time after this she passed her three months' *'idda* period. All this time, she said, the husband did not give her any support, nor did he come to see her.

Once she passed her *'idda* waiting period she came to court to finalize the divorce and it was at this time that the husband was summoned to court and claimed that he had not divorced his wife and did not want a divorce. Furthermore, he claimed that she had been *nashiz* (disobedient) all this time because she left his house.

The woman brought two witnesses with her who testified to the veracity of her claim and to the amount of *nafaqa* which she needed per month. The amount mentioned was £S18.00.

Because of the absence of the husband's lawyer, the judge scheduled the revision appeal for one month from this date.

(Observed in Omdurman Appeal Court, 13 January 1980)

In this case it was the request for *nafaqat al-'idda* which brought the woman to court, but ultimately the decision rests upon whether, in fact, a divorce took place. The statement which was taken for divorce only implies divorce in the law, but the husband's lack of interest and support during the pregnancy and birth while she was away from her husband's house are militating factors against his charge of disobedience on her part. The problem of establishing divorce is a serious legal and social

question. An explanatory note to Circular no. 41, section 4 (1935), says that divorce is not pronounced unless there is clear intention to do so, and it outlines what is clear intent to divorce in the Sudan. Expressions such as 'Go out of the house' or 'Put on your *tobe*' (the garment worn for going out in public) only *imply* divorce. If the wife believes a divorce has taken place and she seeks to confirm this, the husband will be summoned to court to swear upon his oath what his intention was. If he denies that divorce was his intention, then no divorce has taken place (Supplement to Circular no. 41, 1940). The fact that marriage and divorce registration are not required by law adds to the confusion evidenced in this case whereby the wife, without official confirmation or denial of the divorce, presumed that she was in fact divorced. The matter was only clarified for her once she attempted to secure her *nafaqa* including *nafaqat al-'idda* payments. Given the irregularities in this case, the judge will have to determine first, if there was a divorce, secondly, if the wife is in a state of disobedience and lastly, depending on the result of the first and second determinations, which *nafaqa* payments and how much is due to the wife and her dependent children. Given the bias in the law in favor of marriage over divorce and the general preference of Sudanese women to avoid divorce, with its attendant economic difficulties and social stigma, the case should move in a direction which preserves the marriage under certain improved conditions for the wife and the family.

Maintenance of Family Members other than the Wife

A man is legally bound to maintain not only his wife but (1) his infant child, (2) his full-grown son or daughter who is poor and incapable or earning a living and (3) his parents or grandparents if they are poor or indigent (Sheikh Abdul Kadir Mekkawi, 1899: 176). As a general rule any relative who is within the prohibited degrees¹ is also a candidate for support if they are poor or incapable of earning a living. This statement is an elevation to law of the principle of mutual support within the extended family which has been the norm in the region since pre-Islamic times. It is because of the deep-rooted character of this code of economic responsibility for kin members that violations of the norm socially and, of course, legally are especially shameful. Not to care for one's relatives in times of their need is despised behavior, particularly if the one who should support has had good fortune in business or in one of the professions. The economic responsibilities toward the extended family have become a burden unwillingly accepted by some educated men and businessmen in the contemporary Sudan, and at least part of the explanation for the 'brain drain' to oil-rich and Western countries has been a desire to escape these family responsibilities.

Those who return with degrees from Europe, the Soviet Union or North America and who are gainfully employed in the Sudan are expected to assist with family needs from their salaries. This is an informal, unofficial form of *nafaqa* which is socially understood, in a profound way, as collective sharing and support, and is definitely expected within the household and preferably within the patrilineal extended family. The understanding is also there that in hard times you will receive that same support in return. This is so deep that it is rarely spoken about except when the duties are neglected.

Given this background, it can be readily imagined the disgrace which attends the hearing of a *nafaqa* case in court which involves a family member other than the potentially conflictful dyad of husband–wife. I observed the resolution of such a case, the pain of which was such that upon its settlement the pair came to court to formally declare that good relations had been restored, this accomplished by *sulh* or peace-keeping agreement.

This case is part of a *tenfiz* (judicial order) to stop forced *nafaqa* payments between a man and his mother. Some time ago the mother had gone to court to force her son, who was a member of the Sudan Police Force, to support her. The mother came to court with her son to announce that such payments had been made, that they had reconciled and that the son now amicably supported her. The mother therefore requested that the execution of forced *nafaqa* payments be stopped and that officially peace between them (*sulh*) now existed.

The son had with him as a witness a fellow member of the police force.

(Observed in Khartoum Second Class Court, 3 January 1980)

It is difficult to put into words the poignancy of this brief moment in court between a mother, who was clearly forced by economic circumstances to obtain a court order for her maintenance, and the son, who once shamed by his behavior now brings the matter to a happy conclusion. The *sulh* significantly was witnessed by a fellow worker in the police department where presumably the court case was the subject of discussion and public censure. The son could now return to the Police Force with a new face and the mother was free from her economic worries and the pain of legally enforcing what should have been unquestioned support.

Some of the traditional observers of the contemporary Sudan might click their tongues upon hearing of a case like this and note with regret that it is a sign of the times, that life is deteriorating even to the extent

that sons must be forced to support their mothers. In fact what is taking place is basic social change such that some extended family patterns are being disrupted in favor of the establishment of the nuclear family, and the nuclear family established by affinity rather than consanguinity is emerging. This is occurring within a wider band of socio-economic change whereby traditional family subsistence is being replaced with a cash economy and an increasingly dependent and weak Sudanese economy.

Maintenance of Minors while their Custody is being determined

The last Judicial Circular to be issued (no.62, 1979) dealt with the subject of *nafaqa* for minors while a child custody case is in process. The Circular was intended to resolve the problem of the maintenance of minors during the usually long and difficult child custody (*al-hadana*) cases. Such cases may extend over a year or more. An earlier explanatory note (Nashra no.9, 1958) had directed the courts to enforce *nafaqa* for minors from the date determined by the court's investigation that payment should have begun.

However the investigation itself may require some time, so Circular no.62 directs the judge in a child custody case to first make a determination of the maintenance needs of the minor(s) involved and issue a direct order himself. The stated reason for this reform is the current economic crisis and the high rate of inflation which gives an urgency to the meeting of the needs of minors in the shortest possible time (Circular no.62, section 16). According to this Circular the judge himself makes an estimate of the amount of *nafaqa* adequate to the support of the child without resort to the time consuming task of hearing expert testimony since the amounts are liable to change during the legal case given the current inflationary economy and the length of the custody cases themselves.

The Circular suggests a form to be used by the judges for this purpose and orders that the new procedure be put into effect immediately.

This Circular was the last to be issued by Sheikh Mohammed al-Gizouli who retired in 1979, and since then no new Grand Qadi has been appointed. The Sudan, in its move to consolidate both the Civil and Shari'a courts, is eliminating the role of Grand Qadi and establishing the Chief Justice as the sole authority in the judiciary.

Summary Remarks

Many areas of Islamic personal law which require a court appearance, for example divorce, obedience or maintenance cases, carry with them a certain degree of shame or loss of dignity. But among these I would suggest that the maintenance cases are the most shameful because they require the direct allegation and possible proof of non-support within the family unit, consanguinal or affinal. In a society which values generosity above all else and where that value is tied to personal dignity and self-worth, the involvement of a man in a *nafaqa* case is a blemish on his character and that of his family. Thus it is not surprising to find personal boasts that one's village is without such cases, or that a man is anxious to publicly make peace, through the legal institution of *sulh*, with the offended relative.

The primary responsibility for a man rests with the adequate and just maintenance of his wife (wives) and their joint offspring: however, a man of some means is not only socially responsible to his family of orientation, but legally as well. The gossip of people (*kalam anas*) is usually sufficient to get a man to perform his responsibilities if he is remiss. But the law is prepared to apply its stronger sanctions if necessary. The large number of *nafaqa* cases in the courts suggest that the traditional social sanctions may be increasingly ineffective in the cities so that the strength of the law is often required to obtain support. *Nafaqa* cases are probably far fewer in the rural areas where familial and community ties remain strong and people are less dependent on a cash economy; but the data are sparse on the question of *nafaqa* in the rural Muslim Sudan.

One area where there may be difficulty in the future is the sharing of financial responsibilities between working husbands and wives. Now only a small percentage of married women are in the work force, but this number is steadily increasing. *Nafaqa* for the wife is based upon her economic dependency and working women are not bound by law or social practice to contribute of their wages to the household expenses. With the current inflationary economy and the number of working women increasing some new *modus vivendi* must evolve such that women are afforded the benefits of working outside the home for wages and assume certain economic responsibilities as well.

Nafaqa is such a vital element of the law that it was singled out for reform during the early, more progressive years of the Numeiri regime. In 1970 by decree of the Attorney General, *nafaqa* payments were permitted to be extended to half of a man's salary which may be taken directly by the employer with an order to do so from the Shari'a court; however, in practice this rarely exceeds one-quarter of a man's income.

PARENTAGE, LEGITIMACY, CHILD CUSTODY AND
THE GUARDIANSHIP OF MINORS

The mutual rights and obligations established through marriage between a husband and wife have their parallels in the law in the relationship between parents and children, albeit with distinctly different social content. The primary legal relationship between parents and children centers around the question of adequate maintenance of dependent children and aged parents. The protection of the economic and social welfare of children is a major responsibility of parents that is enforceable in Islamic law. This is based on the assumption of the legitimacy of the children, either through their being the product of a legal Muslim marriage or by acknowledgement of paternity.

Parentage and Legitimacy of Children

Adoption of children is not recognized in Islamic law² (Asaf A. A. Fyzee, 1964: 180), and the legal distinction made with reference to the parentage of children is simply whether they were born as the natural offspring of a legitimate Muslim marriage or whether some process of legitimacy is possible or achievable.

The presumption in Sunni Muslim law is that of legitimacy of a child born in wedlock of a husband and wife. The presumption is so strong that traditionally the law recognized the legitimacy of children born within six months of the date of the marriage or up to two years from the time of the dissolution of a marriage contract through death of the husband or divorce (Ameer Ali, 1895: 191). Maliki law even extends this period up to four years after a divorce, a point which may seem absurd from a scientific standpoint, but one which can be viewed from the perspective of the law as favoring and promoting the legitimacy of offspring from a marriage which was validly contracted in the first place. According to Hanafi law, a child which is born of an irregular marriage (one contracted without having satisfied all of the requirements of a valid marriage) is also legitimate, and children born to a wife whose husband has been absent for one year are also legitimate. Some scholars of Islamic law believe that the laying down of such long periods to establish the legitimacy of children was the result of the intention to cover any medical abnormality in the absence of a full scientific understanding of conception and childbirth. Others suggest that the motive was, as already mentioned, humanitarian as it sought to avoid abuse of the law of divorce and the possible disavowal of children (Ameer Ali, p. 193).

In spite of these very liberal interpretations of the conditions which confer the status of legitimacy, what is in practice in the Sudan today is the legal limit of one year from the date of a divorce or of the husband's

absence for a child born to a woman to be legitimate. A denial of paternity on the part of the husband is not sufficient to take away the legitimate status of a child. Legitimacy establishes the *nasab* or definitive genealogy of the child which has decisive ramifications in legal and social relationships of marriage, inheritance and other aspects of Muslim personal law.

Illegitimacy

A child born as a result of illicit intercourse (*zina*) has no legal rights; as in the West, his or her status is illegitimate. The child is thus denied legal access to inherited wealth or property from his natural father, although an illegitimate child may be named in a will. The child is likewise excluded from inheritance through the mother, but may be named as a recipient of a gift (*hiba*) or be mentioned in a will.

In Sudanese society the effect of giving birth to an illegitimate child is very severe indeed, since it is a *prima facie* case of the worst violation of the sexual and moral code. In an earlier study which I made of homicide in the Sudan, a leading type of murder perpetrated by women in the Muslim regions was the destruction of an illegitimate child (Fluehr-Lobban, 1976: 31). In discussion of the subject with Sudanese women, a variety of reactions were mentioned in response to the question, 'What recourse does a woman have who has become illicitly pregnant?' (*hamil bil haram*). Some reported that they would leave and go to another place to bear the child and then leave it there with its eventual welfare uncertain. Since care for unwanted or orphaned children is still undeveloped in the Sudan, the child may be left to the care of government agencies, such as the Ministry of Health and Social Affairs. Abortion is not a real option, for the operation is not readily available in the hospitals and the procedure otherwise is too risky. Obtaining contraception for the unmarried woman is, socially, nearly impossible. Some women say the only effective way to erase the mistake is to kill the child. All forms of homicide are violations of the Sudan Penal Code and therefore do not involve the Shari'a courts at all. The following case of infanticide is typical in that it embodies the human tragedy and the judicial response to the suffering of the woman:

Amna's husband was away from the village for about four years. During that time Amna conceived a child, and the villagers began to avoid her because they knew she was pregnant, and she stayed confined to her house.

When she began to feel the birth pains she went to her aunt's house for help, but the woman drove her out. She felt the child

coming and so she entered a deserted house and in a very depressed state gave birth to a male child. She then dug the ground and put the child in a small grave, covered it with earth, and went home.

Some of the villagers who watched the scene from afar went to the house and exhumed the body and brought it to the Sheikh who reported the incident to the police. Amna was found guilty of murder.

Amna's plea for mercy was poignant. She said she married a man four years ago who left her and never wrote or sent money. 'There is no one to provide for me as my parents are dead. Owing to my need to survive I did that which made me pregnant and I hated myself for it. My neighbors turned me out and in a state of misery and shame I gave birth and lost control of my senses. I appeal for mercy so that I may support my living daughter.'

(Trial of Amna Bint Awad Al Saeed, Northern Province, Merowe.)

A much longer prison term would be in order for an offense of proven homicide, but in this case, as in others of its kind, the civil judges have reacted humanely and normally reduce a sentence from life or an extended number of years to two years. The legal justification has been that a woman who kills her child immediately after birth is not in control of her senses (opinion of Justice Abu-Rannat, in Trial of Nafisa Ahmed, Northern Province, Major Court at Atbara, cited in Fluehr-Lobban, 1976: 31).

This choice to kill rather than live with the shame of an illegitimate child illustrates the severity of the social reaction and stigma attached to women in these circumstances. With no way to measure the frequency of illegitimate births, I cannot comment on the scope of this social problem in the Sudan. However, in one case of which I have personal knowledge, a woman teacher and her illegitimate son were unable to settle in any community where she taught in the rural Sudan because of the local outcry against her. She was driven from six schools in two years, and finally returned to Khartoum seeking the anonymity of life in the capital city. Even there she was haunted by her past, socially ostracized, and finally she sought psychiatric help. Her response to her tragic condition was a consuming desire to leave the Sudan with her son and begin life over again in some other place.

As with other societies which stigmatize illegitimacy, the burden of social rejection and of the economic maintenance of the child falls almost entirely on the woman and her family, if they have not turned her out due to the dishonor wrought upon them. Even if the woman names the father, he is under no legal responsibility to support the child as Islamic

law cannot recognize illegitimacy. In Hanafi law the mother is bound to maintain her natural son or daughter; however, a number of Muslim countries have passed legislation which requires the putative father of an illegitimate child to pay support (Asaf A. A. Fyzee, 1964: 206).

Acknowledging Paternity

The Shari'a cannot confer legitimacy; the law can merely help to determine if a birth is legitimate or not. For example, any child born in a valid or irregular marriage is legitimate, while any offspring which results from a period of cohabitation, however long, or fornication is illegitimate. There is no concept of 'common law' marriage in Sunni law and therefore legitimacy cannot be established in this way.

However, the Shari'a does recognize the acknowledgement of paternity by the father's admission of his act, if the child is not the result of an illicit cohabitation or adultery. Such acknowledgement may be necessary in cases where there is some ambiguity in the validity of the marriage contract, the period of cohabitation, some prolonged absence by the husband or other irregularity in the marriage and birth. Acknowledgement may be by an official statement admitting paternity which is made publicly in a Shari'a court or by the acts of the father which imply paternity, such as visiting and voluntary maintenance of the child. A casual admission is not sufficient, while a clear repudiation of paternity destroys the weight of implied acknowledgement (ibid., p. 187).

Acknowledgement of paternity has the legal effect of acknowledging the marriage and the wife too, while it bestows on the child full rights in the Shari'a. For a woman who seeks the acknowledgement of paternity for her child, if the father has neither admitted this in court nor showed any interest in the child by his behavior, the only legal recourse is to make a suit which proves there was a marriage, even an irregular one, to the father at the time of the birth. This validates the wife's claim and forces the issue of acknowledgement of paternity on the husband.

The frequency of cases of acknowledgement of paternity is difficult to determine because in terms of statistical reporting they are subsumed under the general category of *ish-hadat*, or things which have been witnessed. According to judges interviewed on the subject, the incidence of such cases is low.

Child Custody (Al-Hadana)

Al-hadana, the care and custody of children, is a matter which is subject to variation in practice depending on which school of Islamic jurisprudence is applied in a given country. The Sudan provides an example of the application of the Hanafi code as modified by Maliki principles, developed through the issuance of Judicial Circulars by the Sudanese Grand Qadi. Before proceeding to the particulars and cases in the Sudan example, a brief review of the general features of the law regarding *hadana* will be given.

Hadana is derived from the same Arabic root as is the word *hidn* or 'breast' and, in law, child care and custody is strongly associated with the mother, primarily, and other females in the maternal line. Child guardianship, maintenance and matters related to education and upbringing are properly the legal responsibility of the father, despite the prior right of the mother to custody. In theory the right of custody begins at birth, whether the child is male or female. In Hanafi and Maliki law custody rights are almost exclusively a female prerogative, or at least women always take precedence over men in matters of custody. The law regarding *hadana* is applied when there is marital separation, especially after divorce or repudiation. But even with parents who are married and domiciled together, the husband is legally constrained from removing the child from its mother against her wishes. (The father cannot take the child on a long journey, for example, without the consent of the mother.)

Upon divorce or repudiation of the mother, the custody of minor children falls to their mother; upon her death or unsuitability, to women in the maternal line. In Maliki and Hanafi law men are accorded *hadana* rights only in default of all female relatives and a male *hadin* is never permitted to take custody of a female child unless he is a relative from within the prohibited degrees (of marriage). In the maternal line preference is given to ascendants over collaterals and thus the grandmother takes custody before the aunt. In most schools of Islamic jurisprudence *hadana* for a boy ends at age seven and at age nine for a girl. However, Maliki interpretations differ from the other schools in permitting the mother to retain custody of the boy until puberty and of the girl until the consummation of her marriage if the court decides extension of custody is in the interest of the child. The Sudan, although it applies Hanafi law generally, has stated a preference for the Maliki provision on this point (Circular no.34, 1932).

Normally when the child comes of age he/she is remanded to the custody of the father or in default of the father to the child's guardian (*al-wali*), whose responsibilities are different from those of the custodian.

The law sets certain requirements for the child's custodian (*hadin* or *hadina*), and occasionally biological mothers may be separated from their children for failure to meet these conditions. The custodian should be adult and sane, in good health; she/he should be capable of ensuring the safe-keeping of the child and not hold an occupation which keeps her/him away from home for long periods; a woman custodian should not be immoral (*fasikha*) and her home should not be a place of debauchery.

Besides the above requirements, certain other situations militate against the mother's right to the custody of her child; if she remarries or if she is not a Muslim. Remarriage of a repudiated woman is usually sufficient to deprive her of custody of the child unless she marries a man within the prohibited degrees to the child, for example, the girl's uncle. The argument here is that a newly married woman must devote all of her time and energy to the new husband and the child would be neglected while the husband, if within the prohibited degrees, is presumed to have a natural affection for the child.

The various schools of Islamic jurisprudence differ with respect to the question of the religion of the mother and her custody rights. The Shafi'i and Hanbali schools say that a non-Muslim mother cannot be custodian of a child, while the Hanafi and Maliki schools say that a Christian or Jewish woman has the right of *hadana*. The Hanafi interpretation adds that if a non-Muslim mother attempted to convert the child away from Islam, custody would be denied. The Maliki interpretation holds that once the obstacle for withholding custody from the mother has been removed, she has the right to seek custody again.

Another requirement of the *hadina* who is the mother is that she not settle in a place remote from the home of the father unless that place is the land of her birth or where the marriage was concluded. In Hanafi law, the judge may simply order the mother to return with the child to the place where the father is living.

Of the women entitled to *hadana* only the biological mother is required to accept it. Another *hadina* may decline or she may claim a wage from the father separate from the cost of maintaining the child, according to Hanafi law. Maliki law forbids this application for *hadana* wages.

In negotiated divorce (*khulu* or *mubara'a*) the parties may agree to something other than these rules regarding *hadana* so long as it does not contradict basic principles of Islamic law. So, while the wife may give up the cost of maintaining the child in consideration of the divorce, the husband may not force her to relinquish custody and the wife may not negotiate a prolongation of the legal period of custody.

The Case of the Sudan

Shari'a Circular no. 34 (1932) specifically favours the Maliki provisions over the Hanafi law with respect to the question of *al-hadana*. The Circular directs all judges of the Shari'a courts to apply the following:

1. The judge is permitted to allow the period of legal custody to extend beyond seven years until the age of puberty for a boy and beyond nine years until the consummation of marriage for a girl if the judge believes that this is in the best interests of the child.
2. No maintenance fees for *hadana* may be collected after the age of seven years for a boy and nine years for a girl.
3. If the father marries his daughter specifically with the intention of removing her from the custody of her mother or another relative, the custody will not be removed from the mother until the time of the consummation of the girl's marriage.

(Judicial Circular no. 34, 1932, from Fluehr-Lobban, 1983: 113)

The social–historical context in which this Circular was issued is evidenced by the following incident in which a mother petitioned the Sudanese Chief Justice in an effort to retain custody of her daughter, having found no relief in the Shari'a court. The Chief Justice at the time was English and the clash of legal philosophy is clear as this sample of memoranda between the two shows.

The Chief Justice wrote to the Grand Qadi:

I think you must agree that the forcible separation of the child from her mother should be avoided if possible. No doubt a great deal of the petitioner's fears for her daughter's future may be attributed to maternal anxiety, but the fact of the father's failure to fulfill his obligation in respect of alimony (maintenance) does not inspire confidence in his ability or desire to treat the child properly when once he has control of her.

(letter to Grand Kadi, 28 October 1931; Sudan Law Project Documentation Files)

The Grand Qadi replied:

If the father of the girl has obtained a judgment from the Shari'a court ordering delivery of the girl to him, under the provisions of the Shari'a law the girl must be delivered to him. On the other hand, if the mother of the girl has any objection to make against the judgment on the grounds stated in her petition, it is open to her to lodge an appeal against the judgment or apply for revision and the competent court will give its decision after inquiry and investigation.

As regards the question of arrears of alimony due to the petitioner, this is a matter which does not conflict with the right of her former husband to custody.

(Letter to Chief Justice, from Ismail el Azhari, for the Grand Kadi, 29 October 1931)

The woman's petition was itself treated as an application for revision in the Shari'a High Court. In the meantime the father was convicted for his failure to pay maintenance fees and was imprisoned in Port Sudan for six weeks under Section 198, 2a of the Civil Justice Ordinance. The judgment of the High Court was to confirm the decision of the lower court in favor of the girl's father, handed down on 3 February 1932.

According to Sheikh al-Gizouli, before the issuance of Circular no. 34 the Sudan applied the Hanafi principle on the question of *hadana* which was rather harsh. The Maliki provision was adopted because its paramount consideration is the welfare of the child and with reasonable cause the period of custody may be extended beyond the normal seven years for a boy and nine years for a girl. Applications for extension of custody are made in court and decided using judicial discretion.

A number of hypothetical cases regarding *hadana* were posed by Sheikh al-Gizouli giving his opinion of the likely decision of the court. In a custody case where the home of the mother is adjacent to the child's school while the father's home is at some distance from the school, the court would decide for the mother to retain custody, that is, if nothing can be proved against the mother or her female relatives. In another situation, where the father is working long hours (for example 6 a.m. to 6 p.m.) and he has little chance to be with the children because of his job, the court would decide against his taking custody because it is against the best interests of the child. However, if the father marries again, this is a favorable circumstance for him in his arguing for custody rights. If the child in the mother's custody is not being properly maintained by the father (which is his duty), the mother has the right to make a claim for *nafaqa* (maintenance) in court against the father. By taking custody of the child the mother does not relinquish her right to maintenance of the child which includes, in addition to food, clothing and shelter, any medical or educational services that may be needed by the child.

In court, if the father wants to take custody of the child prior to the age of seven for a boy and nine for a girl, the onus is on him to prove that the mother is unfit to retain custody. On the other hand, the application by the mother to continue her custody of a boy after age seven or a girl after age nine, reverses the situation and the burden of proof is on her to show why the child should remain with her. Whatever

the decision in court, whether in favour of the mother or father in matters of custody, still the father retains certain rights and responsibilities of guardianship throughout the period of the minority of the child.

The Hanafi scholars have pondered the question whether *hadana* is a right (*haqq*) of the custodian or of the child. The discussion usually concludes that it is the right of the child, and the courts in the Sudan are directed to depart from the usual posture of neutrality to act as a representative of the child's interests, a *guardian ad litem* or interested party on behalf of the child. The priority of the 'best interest of the child' has been recognized in the legal codes of Tunisia, Iraq, Egypt, and Pakistan (Coulson, 1969: 110–11).

Hadana cases are usually lengthy and complicated as a full and exhaustive investigation has to be carried out. In fact, because of the lengthy nature of these cases, the most recent Judicial Circular no. 62, issued on 25 November 1979, dealt with the question of the maintenance of a child during court proceedings which may exceed a year in length. The Circular calls upon the judges in *hadana* cases and in difficult *nafaqa* (maintenance) and *talaq* (divorce) cases to assess first of all the maintenance needs of the child and to issue a decree giving legal sanction to the payment of maintenance expenses during the entire period of the case. This order is understood to be temporary and can be changed after the final decision in the case.

Summary of Cases

In the three towns, during a six month reporting period in 1979 (1 January to 30 June), a total of 231 *hadana* cases were heard and completed in the Shari'a courts. Relative to other personal matters which are handled by the courts, it is one of the more common types of case, comparing closely with obedience (*ta'a*) cases but falling well behind divorce (*talaq*) and maintenance (*nafaqa*) cases. Table 3 below gives the official figures for one year for all of the Shari'a courts in the Sudan in the selected areas of child custody, obedience, maintenance and divorce, comprising all the most common types of case, apart from inheritance.

TABLE 3

	<i>hadana</i> (child custody)	<i>ta'a</i> (obedience)	<i>nafaqa</i> (maintenance)	<i>talaq</i> (divorce)
1978–1979*	2,491	6,404	10,158	6,585

*Reporting from 1 July 1978 to 30 June 1979 from all Shari'a courts in the Sudan; courtesy Department of Statistics, The Sudan Judiciary, Khartoum.

The *hadana* cases which I observed or read on file raised the following legal points:

1. the suitability or fitness of the mother as legal custodian;
2. movement of the mother with the child to a place of custody, or of the marriage, or to a place distant from the residence of the father;
3. remarriage of the mother;
4. proper upbringing of the child;
5. age of the child.

Three of these cases are summarized here for purposes of discussion of the legal issues which each raises. The first case was decided in the Shari'a Supreme Court in 1974 (Cassation/83/1974) and is on file in the Sudan Judiciary.

The father of a boy aged six years, eight months instituted a suit in Khartoum District Court against his wife claiming that the legal period of custody had elapsed and that she had taken the boy to Khartoum and refused to hand him over to his father. The wife—mother responded that she was living with her father in Kerima (in northern Sudan) and only came to Khartoum for medical treatment; she stated further than the boy was still under age. The husband—father said that she was actually living in Khartoum and the place of residence of the mother was in question. Initially, the District Court ruled in the father's favor opining that while the marriage was still in existence, the place of custody was the matrimonial home where the father currently resided. It was understood that if a divorce took place the mother had the right to move with the child to another place provided the place was her home or where the marriage was concluded.

Two days after this decision the mother appealed the case before the Province Court saying that she was denied custody of her son because she had moved from the place of the marriage contract but that the boy would do better in Khartoum and the father could visit him and return to his residence in the same day. She also mentioned that she viewed the husband taking a second wife as a potential injury to the boy.

Two months later the Province Court reversed the decision of the lower court, saying that the father's removal of the son to a distant place violated the mother's legal right to custody which had not lapsed. It was brought out that the father had agreed that the boy could be brought up in Kerima although neither Kerima nor Khartoum were his home nor was the place of the marriage his home. Khartoum had more favorable educational

and medical facilities and in fact the father was able to see his son more frequently in Khartoum than in Kerima. It was further established that the wife had been divorced and that she had completed her *'idda* period.

A few days later the father appealed this decision before the Supreme Court saying that the lower court was convinced that the child should be with him and since the boy was about to reach seven years of age he should be delivered to him.

The High Court held that the taking of a child from the place of custody, although a condition of custody, is not a bar to custody. The mother should be ordered to return to the place of custody so that the right of the father could be allowed without injury to the *hadina* or legal custodian. If the mother refused to do so the child should be delivered to the custody of his father. The mother abided by the decision; this was admitted by the appellant who was the father and was testified to by two witnesses, and the decision of the Province Court was upheld, the child remaining in the custody of his mother.

The issues raised in this case are consistent with questions arising from the conditions for legal custody or *hadana* in the Shari'a. In question was the right of a divorced woman, who had completed her term of *'idda*, to the custody of a minor son whom she had taken to a place other than the place of custody or the place of the marriage contract. The proper upbringing of the child was a factor, at least in the decision of the Province Court which mentioned the favorable environment of Khartoum, with educational and medical benefits for the boy. Also at issue was the age limit for custody of the boy by the mother, with the court deciding that the boy was still a minor, properly to remain in the care and custody of his mother. Not at issue was the character of the mother herself who had completed her *'idda* term, had not remarried and was living with her father after the separation from her husband. At home, in her father's guardianship, her moral fitness to be legal custodian was not questioned.

The Province Court ruling in favor of the mother cited the Islamic jurist Ibn Abdeen who said that the father cannot travel with the child or remove the child in any way until the period of custody for the legal *hadina*, the mother, has elapsed. The High Court, in ruling that removal of the child from the place of custody is a condition of custody but not a bar to custody, followed the rule of law that the custodian and the child should remain in the place of custody. Since the mother did move to another place with the intention of residing there and this was not the place of the marriage contract, nor was it a place where the father

could visit and return in the same day, so the court was bound to order the mother to return with the child to the place of custody.

The next case raises a point which is familiar to the Sudanese courts but may not occur in other, more homogeneous African and Arab contexts. It deals with the matter of conversion, to Christianity or Islam, as a means to obtain a desired legal effect. A Christian man may convert to Islam so that he may repudiate his wife, which is illegal among the Christian sects most prominent in the Sudan. In this case a mother had converted repeatedly between Christianity and Islam in hope of being judged under the Civil legal system and thereby retaining custody of her daughter.

The mother of a nine year old girl legally in the custody of her paternal grandmother had tried unsuccessfully three times in the Shari'a courts to obtain her daughter's custody. Her appeal on the last decision was unsuccessful and she applied again to the Appeals Court which confirmed the decision of the Province Court.

Despite her legal failures, the mother took her daughter and refused to return her to her legal custodian, the grandmother, who immediately petitioned the District Court to execute the previous judgments. The court advised her to initiate a new suit which she did and which was decided in her favor on several grounds, one of which was the continual conversion of the mother from Islam to Christianity and from Christianity to Islam, at last settling as a Christian.

The mother then appealed to the Province Court which reversed the decision in favor of the grandmother on the ground that legally she was not a party to the suit since the girl was nine years of age, past the period of custody, and it was the responsibility of the agnate males, especially the father, to institute a suit for custody.

The case went to the High Court where the decision was that the District Court should have dismissed the case outright as the girl was in the legal custody of her *hadina*, the grandmother. The Shari'a Judicial Circular no.34 on the question of *hadina* permits the court to extend the period of custody for a girl until the consummation of marriage and the welfare of the child is the governing principle. But in this case the court did not conduct a proper investigation as to the conditions of life for the daughter living with her mother despite important information about her repeated conversions. The court also failed to summon the father who might have shed light on the case. The High

Court ruled that the mother was practicing illegal custody of her daughter and the judgment of the District Court in favor of the grandmother was restored.

(Cassation Decree No.1/72, reported in *Sudan Law Journal and Reports*, 1972.)

The issue of the mother's conversion was not central to the case, but was a significant piece of information attached to the case. We cannot know the mother's state of mind but it can be readily imagined that her continual conversions between Islam and Christianity were intended to satisfy one requirement or another for custody; in fact this was mentioned in the High Court decision. In fact the repeated conversions may have brought into question the stability of the mother. Conversion to satisfy conditions of divorce is more common in the Sudanese courts and although the sincerity of the conversion may be suspect, this does not constitute a bar to utilizing the law in this fashion. The fact that the mother finally settled as a Christian raises doubts as to whether she would have ably raised her daughter as a Muslim.

A more legalistic point raised the issue of the extension of the period of custody if it is deemed necessary to the minor's welfare, provided that a full investigation is carried out. The failure of the Province Court to carry out an adequate investigation regarding the welfare of the child is contrary to Islamic practice with respect to the role of the court in *hadana* cases. Further, the Province Court was incorrect in overruling the decision of the Appeals division of the High Court which it is incompetent to do. Had that court properly reviewed the previous decision it would have dismissed the case and kept the girl in the legal custody of her grandmother.

The following case I observed in the Khartoum Province Court during 1979–80, but unfortunately I left the country before its resolution. It raises the issue of the fitness of the mother to retain custody of her sons once the period of her custody has lapsed.

The mother was a young woman who had obtained a judicial divorce from her husband two years previously on the ground of cruelty (*talaq al darar*). Her former husband, perhaps 15 to 20 years her senior, was applying for custody of their two sons, now eight and seven years old. The former husband was applying to the Khartoum Province Court having failed to win custody in the lower court; both sides were represented by lawyers.

The father's side alleged that the ex-wife was morally corrupted, that she was living apart from her family and had a boyfriend, and that her work with the national airlines as a hostess took her out of the country and away from her children. The mother's side

denied these allegations, saying that she was living alone because the government evicted her family from their house, that her mother now lived close by and that the ex-husband agreed to her work before the divorce was concluded. At a subsequent session of the court where the husband was not present, it was learned that he was a merchant working in Saudi Arabia. His lawyer continued to claim that the woman was not a good, clean woman, that she lived alone and that the children were cared for only by a nanny, and that her work took her out of town quite frequently, which was harmful to the boys. Further, the boys were attending a Catholic school in Khartoum and the father feared that they might not be trained in the Islamic way. The father also alleged that the woman agreed to forfeit custody of the children on condition that the husband divorce her. The woman's lawyer responded with the following points: firstly it should be recalled that the divorce was for reasons of cruelty, so the character of the father might be investigated; secondly, the house where the mother was living with her sons was a good house in a good neighborhood and their grandmother was close by; thirdly, the report cards from school showed the boys to be good students and the Catholic school in question was recognized by the Sudan government as having high standards of education; finally, he pointed out that had such an agreement concerning the custody of the boys been reached between the husband and wife it would be void (*batil*) because the husband had failed to meet the condition and divorce his wife and she was forced to seek a judicial divorce. Moreover, the agreement would have been struck when the boys were underage and legally in the custody of their mother.

(Observed in Khartoum Province Court, during 1979–80)

This case exemplifies a number of the contemporary issues and dilemmas facing parents and the courts in *hadana* cases. I interviewed the mother during one of the last sessions of the case that I attended and she indicated that she had remarried but would continue her work as an airlines hostess. She said that her work took her out of the country only once a month on a flight to London and that all other flights were domestic where she left and returned in the same day.

Since the father was applying for custody, the burden of proof rested with his side to show that it was in the interest of the boys that they be removed from the custody of their mother. He had undertaken to show that the mother was morally unfit to raise the boys in a proper Islamic way and was incapable of doing so due to the nature of her work and her life style. There were also the matters of alleged agreements

regarding the forfeiture of custody on condition of divorce and the alleged acceptance of the wife's working with the airlines by the husband prior to the divorce, but since no signed documents existed, these were null issues.

I had the opportunity to discuss this case with the Honorable Dafa'lla al-Radi, Judge of the High Court, Civil Division, with Sheikh Mohammed al-Gizouli, Grand Qadi, Shari'a Division and with the Honorable Najua Kemal Farid, First Class Judge assigned to the High Court assembled together as a group. Justice Dafa'lla pointed out that in the Sudanese Civil law custody can be awarded at any age for either the mother or the father. The award of custody is determined by the best interests of the child, as with the Shari'a, and he acknowledged that for younger children the decisions of the Civil and Shari'a courts would be very similar. The Islamic justices, Sheikh al-Gizouli and Justice Najua Farid, were concerned that the woman was not living in the 'Shari'a way', that is, with a man who was her husband, father or brother. Her job was also a concern, and the question was raised as to how many hours a day she would actually be spending with her sons.

The remarriage of the mother and her stated intention to continue with her job would, no doubt, adversely affect the outcome of the case for her. Simple remarriage is often sufficient to provide a favorable circumstance for the father taking custody of the children. In this case the woman was asking to retain custody near or at the time of the lapse of the *hadana* period for the boys, and she had remarried and was working at a job which occasionally took her away from home, either of which could result in the termination of the mother's custody.

Concluding Remarks Regarding Child Custody

Islamic jurisprudence, *al fiqh*, regarding matters of *hadana* does differ somewhat among the various schools of Islamic law and in the varying social contexts in which the law is applied. However, certain principles regarding the first right of the mother and her female kin to custody of minor, dependent children and the subsequent right of the father and agnate males to custody are fundamental to the law. Other guiding principles with respect to the welfare of the child and its proper upbringing by both parents are, likewise, consistently applied in courts of Islamic law. Some variation in interpretation of the law regarding *hadana* has occurred around the question of the age at which the custody period for the mother lapses. The Sudan law uniquely combines provisions in the Hanafi and Maliki interpretations of the law to say that the period of custody ends at age seven for a boy and nine for a girl (Hanafi code), but that under certain conditions the court may use

its discretion and decide that the best interests of the child are served by its remaining in the custody of its mother until puberty for a boy and the consummation of marriage for a girl (Maliki law). This provision, enacted into law through the issuing of a Judicial Circular from the office of the Grand Qadi in 1932, permits flexibility and the use of judicial discretion in an otherwise rigid system where strict application of the age limits for *hadana* might have resulted in harsh and harmful judicial decrees.

The cases illustrate the complex nature of each *hadana* investigation undertaken by the courts and explain, in part, why resolution may take up to a year or more. The recent provision, put into law through Judicial Circular no. 62 in 1979 and mandating that the maintenance of the child during *hadana* cases and others be the first order of business, speaks eloquently to this fact.

The notion of the posture of the court as a biased third party, a *guardian ad litem*, representing the best interests of the child is likewise a humane and thoroughly enlightened stance and one which is vigorously defended and rigorously enforced in the courts through the process of judicial review. In one session of the Shari'a High Court which I observed, a decision regarding *hadana* was overturned on the ground of the procedural error of the lower court which failed to carry out a full investigation regarding the custody of the child.

Of lesser importance, but nevertheless an issue, is the lack of adequate record keeping in the Sudan which often results in confusion as to the ages of children for whom birth records do not exist.

The Guardianship of Minors

The patrilineal extended family is at the core of Muslim society, giving rise to sets of mutual relations. The parent-child relationship is primary with the mother's major responsibility being that of nurturance and the father's major contribution that of maintenance. Reflecting the patrilineal system, the mother is bound to the child socially, while the father is bound both socially and legally in that he is required to support his sons until the age of puberty and his daughters until they are married. With respect to the inheritance of property, a minor in the Sudan does not reach maturity until twenty-one years of age (Circular no. 28, 1927, section 15).

The immediate and extended family cultivates and socializes the minor to the correct standards of behavior for an adult Muslim Sudanese woman or man. Training at home for future social roles begins early and young boys and girls by the age of seven or eight years begin to separate clearly by sex into play-work groups. This coincides with the

time of circumcision of both girls and boys, a landmark rite of passage from the more highly dependent stage of childhood, with great celebration and ritual which dramatically marks the transition.

For the most part children are disciplined with a great deal of love in the Sudan and the family, in its extended form, is protective and insulating against the outside world. The word of the father is respected and is the final authority in decision-making. Traditionally many forms of deferential behavior were practiced by the son in the presence of the father, such as not speaking or not smoking. The role of the mother, as intermediary between the children and the father, is not unlike that found in other societies with a patri-centered social organization.

The Shari'a law has developed specialized topics which reflect the highly protective attitude of the society toward minor children. The law regarding guardianship in marriage (*al-wilaya fi zowaj*), especially in the Maliki school, which grew out of Muslim custom and practice in Medina, gives the father or guardian (*al-wali*) of the woman sole right and responsibility to contract her in marriage. Since girls are marriageable after the age of puberty (and until recent reforms younger than this), such an important choice is not left to the minor girl. Moreover, marriage is so serious that it is properly negotiated between adult men, ideally the fathers and the uncles of the bride and groom. Only recently, with the reform in the law regarding consent in marriage, have young women dared to oppose their father's choice of a marriage partner and thus go against the tradition of marriage guardianship.

In addition to the specialized role of marriage guardian, the law has formalized the role of the guardian of the minor's property and finances in the legal role of *al-wasi*. The responsibilities of the *wasi* are outlined in the chapter on inheritance, but in this general discussion of the guardianship of children it should be emphasized that the protection of the property of minors in the law is assumed to be solely the concern of the parent. Where the child has inherited wealth, and this is known to the court by virtue of its having handled the estate, the court will direct that a legal guardian of the minor's financial assets be appointed and that the guardian seek permission from the court before any sale or transfer of the property is made. The guardian is usually the father or grandfather, but the closeness of the kin relationship does not lessen the legal responsibility to the youth and his/her personal assets.

Children are loved and cared for within the collectivity of the extended family, but they do not lose their individual rights in the law, and the Shari'a in the Sudan has taken special pains to protect the rights of minors with property.

NOTES

1. As a marriage partner whether the relative is male or female.
2. This is not to say that adoption is not possible in Muslim society, only that the tie of adoption cannot be recognized as genuine affiliation.

CHAPTER EIGHT

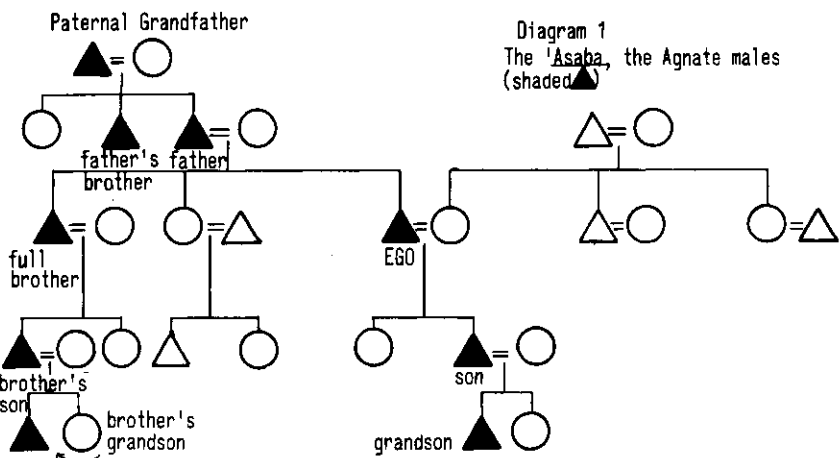
THE TRANSFERENCE OF WEALTH AND PROPERTY

Property and wealth are entwined in the structure of society, with ties formed through blood and marital relations, and the orderly transfer of wealth is a fundamental part of Islamic law.

The law of inheritance is the crowning gem of the Shari'a, complex, yet a profound statement of the social system of Islam itself. The specialized topic of *waqf* in the Shari'a, the religious or family endowment, has undergone considerable change recently and is an excellent barometer of social change with respect to the transfer of property. The growth of the use of wills, which apply outside the area of the specified shares of the Qur'anic heirs, is a recent development worthy of note. Gift-giving has been formalized in the law in an exceedingly wise move which eliminates ambiguity or hard feelings by clarifying the intent of the donor. The significance of this area of the law, in contrast to the law regarding marriage, divorce, child custody and so on, is that it orders and regulates the economic base of the society and its primary unit, the extended family. Thus, conflict in the sensitive area of wealth and property is restrained, although tensions inevitably erupt as wealth has become more concentrated and the extended family ties weakened. A testament to the significance of this area of the law is within the Judicial Circulars themselves issued between 1902 and 1979. Of the 62 directives from the Grand Qadi as to how the law should be interpreted and applied in the Sudan, 23 of them deal with inheritance and the transfer of wealth and property. As with the law of divorce, the Sudan has played a pioneering role with respect to legal innovation regarding the inheritance and transfer of property, in some cases revolutionizing the interpretation of Islamic law on the subject.

In pre-Islamic Arabia inheritance was governed by a patrilineal system of customary law, similar to that of pastoral nomadic peoples elsewhere. The system strongly favors men related to each other in an agnatic line (*al-‘asaba*) and in many cases excludes women altogether from rights of inheritance. Such was the system before Islam modified the patrilineal bias and added to the male heirs a number of relations who normally would have no rights of succession under the customary legal system (Coulson, 1971: 33). So strong is the patrilineal system, tied to nomadic pastoralism, that even among groups which have been Islamized, the Beja in the Sudan for example, strict patrilineal inheritance along customary legal lines prevails (Trimingham, 1969: 23–4). Islam emerged in Arabia at a time of growing urbanization, mercantile activity and the transformation of nomadic Arab life itself. Many of the desert traditions remain and the central position of the male agnates (*al-‘asaba*) is one of the strongest vestiges of the customary patrilineal system.

As a system which reformed and modified the existing customary law, Islamic law specified a number of heirs and their shares in the estate by affixing their portions in the revealed word of Allah, and these heirs are referred to as the Qur’anic heirs, *ahl al-fara’id*. The Qur’anic heirs are conventionally thought of as separate from the ‘*asaba* and indeed they form two classes of heirs representing the traditional and modified systems. The ‘*asaba* can be located on diagram 1, a simple kinship diagram of a classical patrilineal system. In its most patriarchal form, women in the patrilineal line do not possess inheritance rights. At the core of the patrilineal system are the father, the brothers and the sons; the uncles and the grandfathers are secondary.



While under the old system the *'asaba* had control over all the sources of customary wealth and property, in the modified system the role of the *'asaba* is seen most clearly in marriage. The cultural preference for the patrilineal first cousin (*bint 'amm* or *fabrda*) as the ideal marriage partner reveals a deeper bias in favor of endogamous unions and the retention of inherited wealth by the patrilineal kin group. The *'asaba* are likewise the key figures in marriage negotiations, the ideal being between two brothers. And the marriage guardian (*al-wali*) of a woman who contracts her in marriage follows a succession of agnatic relations, first her father, failing him, her brother, paternal grandfather, paternal uncle, her son, grandson and male issue from these. The *'asaba* in retaining control over marriage have thus retained control over a primary vehicle for the transmission of wealth.

The former priority given to the agnate males was replaced with the coming of Islam by an emphasis on the nuclear family, on the husband, wife and children as primary heirs. Beyond this a significant portion of the named heirs which were added to the *'asaba* included non-patrilineal kin and specified female relations. The two moves were intended to reduce the power and control of the *'asaba* and to elevate the status of women through the property and inheritance law. The Qur'anic heirs (or heirs of the fixed portions) are 13 in number, according to Hanafi law which is applied in the Sudan, including the husband, wife, daughter, agnatic granddaughter, father, agnatic grandfather, mother, grandmother (maternal and paternal), full sister, half-sister on the father's side, half-sister on the mother's side, uterine brother (Mohammed Kadri Pasha, 1914: 148). The father and the grandfather, both agnatic kin, are named so that they would not be excluded, as in the pure patrilineal system, by a son or grandson. Three of the relatives, the granddaughter, grandfather and grandmother are not specifically mentioned in the Qur'an but have been added to the list of Qur'anic heirs in Sunni jurisprudence by the use of analogical reasoning (*qiyas*) (Coulson, 1971: 35). Comparing the diagram of the strict agnatic kin with that on which the Qur'anic heirs are shown (diagram 2), the shift away from the *'asaba* and toward the recognition of female heirs is clear. Of the twelve specifically nominated Qur'anic heirs eight are women.

It is apparent that there is a certain structural tension between the two classes of heirs, and certain principles setting the priorities have been established in juristic practice. The primary heirs are within the nuclear family and after they have taken their portion, the Qur'anic heirs take their share; the residue is taken by the *'asaba*. This is the basic rule and within each of these levels of nuclear family, Qur'anic heirs and the *'asaba*, there is a separate set of priorities which can be very complex indeed depending on the total size of the estate and the

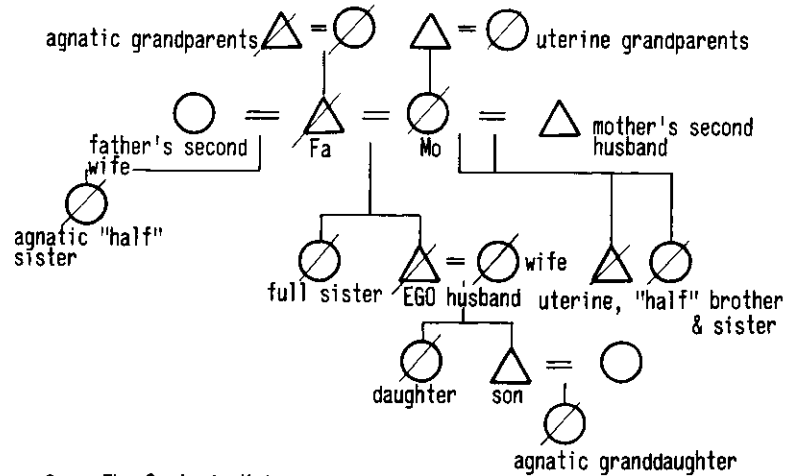


Diagram 2 The Qur'anic Heirs
(represented by slashes \diagup or \diagdown)

number of eligible heirs. It may be, for instance, that the required distribution of the estate among the Qur'anic heirs exhausts the inheritance, and the *'asaba*, though recognized as real relations and potential heirs, in fact receive nothing.

The combination of the agnatic heirs and Qur'anic heirs completes the picture of the Islamic law of inheritance and encompasses those relations who are entitled to a portion of the estate of a deceased Muslim. To this basic diagram (diagram 3) we only need to add mention of the descendants and ascendants of those named, however low or high, for if they exist, they are likewise entitled. The Islamic pattern of inheritance is unusual in that it represents a compromise between the established rights of the patrilineal or agnatic kin and the entitlement of important females in the kin system not necessarily grouped together by the descent principle alone: it is not the addition of the matrilineal kin as a descent group, but the addition of certain females and males related to the deceased as often by marriage ties as by blood ties. Thus it recognizes the importance of intergroup alliance through marriage, along with the primary male descent group.

The primary heirs, husband, wife and children, will receive their portion first and then the other Qur'anic heirs take their share. The husband and wife have mutual rights of inheritance; if there are no children he takes half and she one quarter. If there are children, he takes one quarter and she one eighth. Two wives will share the one quarter and one eighth in polygynous unions, without and with children respectively. In the Sudan, as a result of a reform introduced by

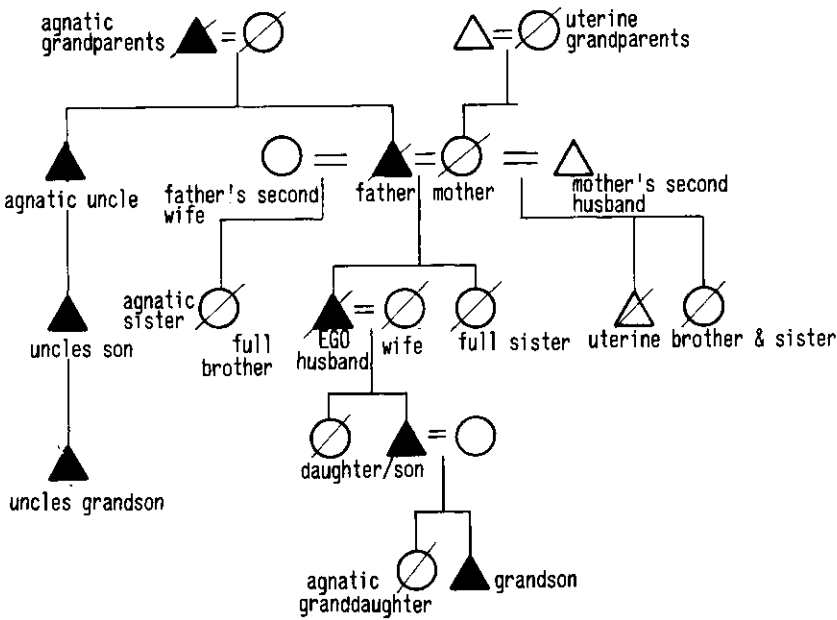


Diagram 3

▲ Agnatic heirs and
△ Qur'anic heirs combined

Circular no.26 (1925), a husband or wife will inherit the entire estate of the deceased spouse if there are no other heirs who can claim a portion of the estate. A daughter alone is entitled to half and two or more daughters will share two thirds of the estate if there are no brothers. The share of children is greater than that of parents, either father or mother, and shows a preference for descendants over ascendants in the immediate family. Sons take twice the portion of daughters as part of the general Shari'a rule that males inherit two portions to every one portion for a female. The only exceptions to this rule are the mother and father, grandmother and grandfather who each inherit one sixth under certain conditions. The other primary heirs are the father and mother who take their one sixth portion if the deceased has left a child. If there is no surviving child, then the mother takes a third (more than the quarter allotted to a childless wife) and the father inherits as a Qur'anic heir the one sixth part, and he inherits a residuary as the nearest agnatic male. A definite tension exists between the parents and the spouse relict as to their shares in the inheritance when there are no children

or other heirs and historically, according to Coulson, this has been resolved in favor of the agnatic tie and the customary pre-eminence of the father (Coulson, 1971: 46).

Beyond the primary heirs in the immediate family who must take their share, the other Qur'anic heirs cannot be disinherited and must also be apportioned their share. These are as follows, in as simplified a form as possible for, of course, the amount of the share shifts according to the number of heirs and their unique combination as relatives:

- husband — half or one quarter (without or with children)
 - wife — a quarter or an eighth (without or with children)
 - daughter — a half (if only daughter) or two thirds (if two or more daughters)
 - agnatic granddaughter — a half (if no daughter of deceased)
 - father — a sixth
 - agnatic grandfather — a sixth
 - mother — a sixth (if there are children or grandchildren or two or more half brothers or sisters)
a third (if no children, grandchildren or brothers and sisters)
 - grandmother (paternal and maternal) — a sixth
 - sister of full blood — half (if only sister and no daughter or daughter of a son)
 - brother on mother's side — a third (if two or more)
 - sister on father's side — two-thirds (two half-sisters, if no full sisters or daughters of the son) half (if she is only heir)
 - sister on mother's side — a third (two or more)
- (adapted from Mohammed Kadai Pasha, 1914)

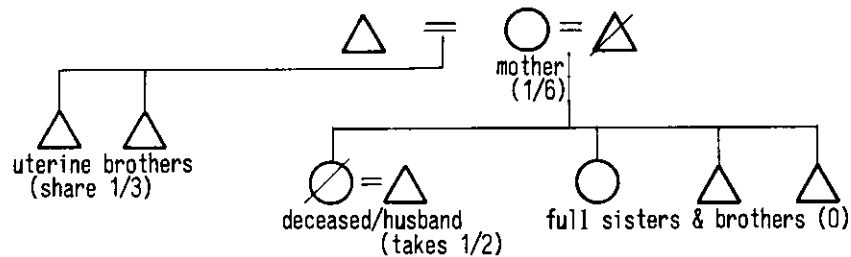
The portions reveal that generally ascendants do not exclude descendants, that the presence of children reduces the number of lineal or collateral relations, and that even the revised agnatic system has some bias toward the '*asaba*' as can be seen in the portions of the half-sisters on the father's versus the mother's side.

The male agnates, the '*asaba*', have a distinct order of priority unlike the fixed portions of the Qur'anic heirs which cannot be altered and, while not equivalent in amount, are equivalent in eligibility. Of the surviving male agnates, the nearest relative(s) inherit the remainder after the Qur'anic heirs have taken their share. The priorities which determine 'nearness' have to do with a lineal before a collateral relationship and the strength of the blood tie. The order of succession of '*asaba*' is as follows:

The son and his descendants; the father and his ascendants; the brothers (of full-blood) and their sons; the descendants of the paternal grandfather, the uncles and their sons; the descendants of the paternal great grandfather and their sons. (Coulson, 1971: 33). Any surviving relations of the nearer relatives exclude the more remote relations.

Two modifications of this general pattern have occurred in the Sudan involving the full and half-brothers and the grandfather. Circular no. 49 (1939) put into effect the resolution to an old problem (called 'al-Himariyya', the 'Case of the Donkey') involving competition between the full and uterine brothers (*awlad al-umm*), sons of the mother or half-brothers. It is a crystallization of the conflict between the 'asaba and the Qur'anic heirs, between the old and revised systems. 'Umar, the second Caliph of Islam (639–644 A.D.), resolved a number of these conflicts, one of which was the 'Case of the Donkey'. A deceased woman was survived by her husband, her mother, two full brothers and two uterine or half-brothers. According to the correct Qur'anic apportionment the husband took half, the mother took one sixth and the uterine brothers took the one third to which they were entitled. The full brothers, the 'asaba, said, 'We don't care if our father was a donkey, we want our share'. The Caliph 'Umar resolved the conflict by ordering that the one third portion be distributed equally among the full and half brothers (related by Sheikh al-Gizouli).

Diagram illustrating problem and resolution of *al-Himariyya*



Resolution: Full and uterine brothers and sisters share the one third.

The Himariyya rule, as it has come to be called, was accepted by the Maliki and Shafi'i schools, but specifically rejected by the Hanafi and Hanbali schools because it contradicted the express terms of the Qur'an itself. First the uterine brothers were deprived of their full one third share and, by extension of the rule to another category of heirs, uterine sisters took equal shares with the full brothers and therefore violated

the Qur'anic rule of the male taking twice that of the female. It is to this division of opinion that Circular 49 addresses itself, and by formally equalizing the shares of the full and half-brothers and sisters in the law the Circular adopts the Maliki interpretation over the Hanafi, a frequent preference of the Circulars.

The competition between the full brothers and sisters and the half-brothers only occurs if there is this peculiar combination of heirs and the resolution in favor of the uterine kin is probably an example of using the juristic principle of *istihsan*, 'seeking the best solution', analogous to the Western legal concept of equity (Coulson, 1971: 77). From a social viewpoint the inclusion of the half-brothers and sisters stemming from the common maternal link (the mother who takes the one sixth portion) is a statement of the strength of the maternal tie in this modified patriarchal system. This is not to say that the strength of maternal ties is an inspiration of the *Himariyya*, but only to suggest that it would not conflict with extant social patterns. On the other hand, were the husband(s) of the mother her agnatic first cousins, the retention of inherited wealth within the patrilineal group would be served by having the uterine half-brothers inherit on a par with the full sisters and brothers. In any event, the type of case is not a common one, yet it is a valuable lesson for it shows the legal system making choices in problem cases and those choices can be quite revealing. Circular no. 49 ends with the statement that, according to the Saheban (the early followers of the Prophet) full brothers and sisters can inherit with the grandfather, and this opened the way to a more innovative interpretation.

The other variation of the strict rules of succession of the agnatic males, the *'asaba*, which has occurred in the Sudan, is with respect to the status of the grandfather and whether this lineal relation excludes the collateral agnatic brothers and sisters. Circular no. 53, issued in 1943, built upon the last section of Circular no. 49 and made explicit the conditions under which the grandfather does and does not exclude the collaterals. In this the Sudan took the first step in 1939 and Egypt followed by introducing more detailed and specific legislation in the Egyptian Law of Inheritance of 1943, upon which the provisions in the Sudanese Circular no. 53 are modeled (Coulson, 1971: 158; Anderson, 1952: 135). In classical Hanafi law the grandfather totally excludes all collaterals in the ranked order of succession of the *'asaba*, first the son and his descendants, then the father and his ascendants and after these the brothers and their descendants. In the majority of Muslim countries the strict provisions of the Hanafi law are followed; however the Sudan took the lead in 1939 (followed by Egypt in 1943 and Syria in 1953 (Syrian Law of Personal Status, cited in Coulson, 1971: 158)) to treat brothers and sisters on a par with the grandfather in inheritance.

The Circular directs the judges to make one of two possible divisions if among the heirs there is the grandfather (agnatic) together with the brothers and sisters of one father and also the half-brothers. First the grandfather may share with them as a full brother, that is both the full sisters and brothers. Secondly, the grandfather may take the residue after each heir takes his/her share if there are no *'asaba* and only sisters. If the division allows the grandfather anything less than the one sixth to which he is entitled under the traditional Hanafi prescriptions, then the court must ensure that he is awarded his one sixth portion and in that case he is not treated in the same way as a full brother.

In Diagram 4, the only heirs are the grandfather and the full brother (although the rule applies to the half-brother too), and rather than the grandfather excluding the brother altogether in the inheritance, the grandfather and the brother are treated as equals each taking one-half of the estate. If, however, there is the grandfather and both a full or half-brother, the grandfather will exclude the half-brother from any share.

Diagram 4

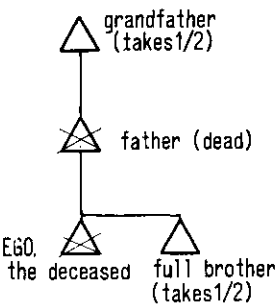
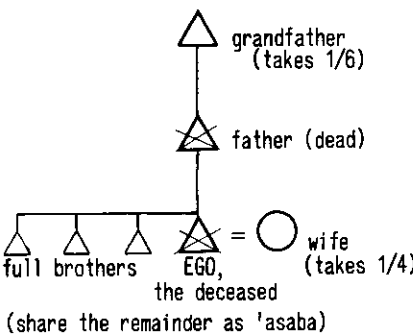


Diagram 5



All of the diagrams relating to the grandfather in estates are adapted by the author from the text of Circular no. 51

In Diagram 5, where the grandfather is together with a spouse and four full or half-brothers, the grandfather reverts to his one sixth portion and is therefore not treated as a brother, the nuclear family being favored over the lineal kin group and the *'asaba*.

In Diagram 6, with the grandfather as heirs are the full brother and sister. In this instance the grandfather is again treated as a full brother and he takes the same share as the deceased's brother, while the sister takes half the amount of the two 'brothers'. In Diagram 7, where there are only female heirs with the grandfather, he is again treated as a brother

Diagram 6

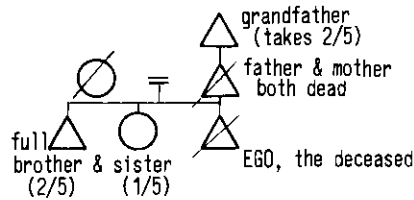
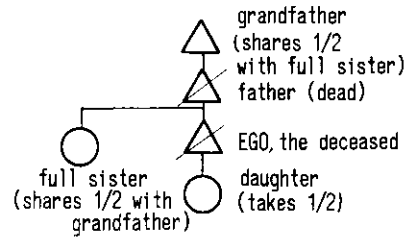


Diagram 7



with the full sister, he taking twice her share, and the daughter takes the half portion, indicating again the preference for inheritance in the nuclear family even if the only child is a daughter. If the estate comes down to a grandfather and a sister only, with no children as heirs and no other *'asaba*, then the sister will have her normal share as a Qur'anic heir which is one sixth, and the grandfather will take the remainder, so the ultimate priority of the *'asaba* over female heirs as a class is shown.

Generally the principle of admitting collaterals, brothers and sisters whether full or half, to inheritance on a plane equal to that of one of the important male agnates, the grandfather, who is second only to the sons and their descendants, is a further development of a historical trend in the development of the Shari'a in the Sudan in the twentieth century, the strengthening of the rights of the nuclear family in inheritance over the more traditional rights of the patrilineal kin group, the *'asaba*.

The inheritance of the whole estate by the spouse relict, if there are no other heirs, the equalization of shares of full and half-brothers and full and half-sisters, and the modified legal status of the grandfather in inheritance are the main areas in which the Shari'a in the contemporary Sudan has moved to mold the law to local needs primarily by stating a judicial preference for Maliki provisions over Hanafi law. I can only assume, although I do not have the historical case records to refer to, that the modifications in the existing Hanafi law during the late 1930s and early 1940s were a response to problems arising in the courts and to the growth of parallel developments in Egypt responding to social currents of the time. These factors stem from the growing strength of the nuclear family primarily in the urban areas. The wife, who is a sole heir according to the strict Hanafi interpretation, takes one quarter of the husband's estate as Qur'anic heir, while the husband takes one half; the remainder would have gone to the Public Treasury, *Bayt al-Mal*, before the reform brought by Circular no. 26 in 1925. The full and half-brothers and sisters were excluded from any portion of the estate of their common nuclear family member by a lineal relative, the grandfather, before Circulars 49 and 51 reordered the priorities in inheritance

away from the power of the *'asaba*. Similarly, the equating of the full brothers and sisters with the shares allotted to the uterine brothers and sisters in Circular 49 solves the problem of nuclear family members being excluded from an estate to which they should be entitled.

The One-Half Portion in Inheritance for Women

That women as a class of heirs receive half the portion of men is part of the law of inheritance by divine command. The Qur'an is very specific about the exact shares of each of the immediate heirs and the general rule is 'unto the male is the equivalent of the share of two females' (Sura IV: 176). In this regard it is well to remember that the coming of Islam wrought a number of reforms favorable to women, among them the right to inherit which was denied to women as a class under the pre-existing agnatic social system. The Qur'an specifically mentions six female heirs including the wife, the mother, the grandmother, the granddaughter and uterine and consanguine sisters. A number of protections are built into the law in practice in the Sudan to insure that female heirs are not disinherited, such as the investigation of suspect wills and *awqaf* (family endowments, *waqfs*) which may intend to decrease the share of women as heirs.

A famous passage in the Qur'an says that 'Men are in charge of women, because Allah hath made the one of them to excel the other, and because they spend of their property [for the support of women]' (Pickthall translation, Sura IV: 34). The half-portion in inheritance for women stems from an assessment of the social reality that women are economically dependent upon men, who are bound by the law to support them. The seeming injustice of males as heirs taking twice the share of females as heirs is more understandable in this light as a legal preference reflecting cultural norms. Women are under no obligation to contribute financially to the households of which they are a part, either in the house of their father or husband. This is a sore point in some houses where women are increasingly working outside the home for wages, but have every right to retain all of the money they earn. After divorce or repudiation the wife is expected to return to the house of her father where she is accepted unconditionally without any financial consideration. The debt of *mahr* made at the time of marriage is payable to the woman alone and it is legally hers to do with as she chooses. Women exert full control over the property which they own and are not legally subject to the authority of their male relatives on this point. These areas of economic autonomy tend to offset the negative aspects of the half-share in inheritance in the overall socio-economic picture for women. In the Sudan, reform in the law regarding inheritance has not been high on

the list of reforms desired by women's groups and the topic has not received the attention that the laws regarding marriage and divorce have.

In only one African country which is predominantly Muslim has the law been reformed to equalize shares of inheritance between men and women, and that is Somalia. Reaction against the reform was strong, resulting in the execution of leaders of its opposition. A more gradual approach, such as the reforms which have occurred in the Sudan regarding wills, *waqf* and inheritance between spouses, appears to be a more successful procedure.

Wills – Wasiya

In Islamic law there is no distinction between ancestral and self-acquired property. The owner, in his or her lifetime, has absolute dominion over his or her property whether it was acquired by inheritance or by his or her own initiative. After the owner's death, his or her power of disposition is limited by the heirs, and according to the traditional Shari'a interpretations of the four schools he or she cannot alter the shares of those who are entitled by law to inherit (Ameer Ali, 1894: 32). The Sudan, it will be seen, has taken some bold steps in this area.

In Islamic law there is no possibility of disinheriting an heir who has legitimate entitlement to an estate whether as a Qur'anic heir or member of the *'asaba*. It is legally impossible for a son to be disinherited, for example, even though relations between the father or mother and the son have not been good. It is probably one of the wisest and best things about the Shari'a that this is the rule, for much ill-feeling within a family is prevented by having fixed portions allotted to the various heirs. The legal system of inheritance also solves the problem so common in the West of dying intestate without having specific provisions for the distribution of an estate outlined in a will.

The Shari'a allows a bequest to be made outside the bounds of the specified portions to the legal heirs up to one third of the entire estate. That is, two thirds of the estate must be allotted to the heirs, to prevent injustice or leaving them destitute. It is common wisdom in Sunni jurisprudence that a bequest is not advised unless the whole of the estate is substantial and the two thirds left to the heirs is adequate to their needs. A will need not be written down and signed in the presence of witnesses, although this is the preferred procedure. A verbal testament or any other mode of communication which clearly signals the testator's intent is perfectly valid. Proof of such a verbal declaration is established in the ordinary Shari'a way with two full witnesses. A person is legally capable of making a testamentary bequest in the Sudan at the legal age of majority which is normally 21 years or determined at the discretion of the judge.

Until 1945 in the Sudan a will could only be made with a non-heir or charitable association as beneficiary. Clearly the intent was to discourage the use of a will to favor one heir over another or to seriously disturb the proportionate amounts to which each heir is entitled. Of course the potential for abuse is curtailed by the limit, well-established in the Sunna, of the bequeathable third. Circular no. 53, issued in 1945, revolutionized thinking regarding individual bequests in the Islamic legal world, and the Sudan led the way in modern reform of the Shari'a as it relates to the rules regulating wills. The Circular affirms the limit of a bequest not to exceed a third of the entire estate, but it makes legal a testamentary disposition in favor of an heir as well as a non-heir. Moreover the relative proportion of the individual shares of the heirs may be altered by the testator provided that the rearrangement does not exceed the third. The Circular also permits the bequest to go beyond the traditional one third if the other heirs (those not mentioned and those who may have their share reduced) agree to the basic alteration of the estate. Such a will is not valid until it is executed in the court and confirmed by the other heirs. After the Sudan broke the ground in this fundamental reform of the law regarding bequests, Egypt followed suit in 1946 and Iraq adopted similar provisions in 1959, except that the latter two did not permit the increase of the bequest beyond the one third of an estate.

The rationale for the change, as stated in the Circular, arises from a motivation of equitable distribution of an estate according to need. 'Since heirs in most cases differ in their economic status or in their age or differ in their needs, we are in search of rules that enable differential treatment ... so that there may not be a delay in giving property to a person who is in need' (Fluehr-Lobban, 1983: 128). In its search for a fair procedure to be followed, the Circular emphasizes that any will exceeding the one-third allowable bequest must be confirmed by the heirs and if they do not agree to the distribution in excess of the third, that amount (the one third) will be given to the shareholders according to their proportion and the excess will be given to the General Estate (*Terika al-Amm*).

The protection of the heirs is certainly a major feature of this Circular, but so also is the new freedom of the testator to make bequests in favor of relations he feels are closer to him. A wife may be favored, or a daughter, at the expense of the traditional strength of the *'asaba*, and once again we find verification of the historical trend away from the patrilineal extended family toward the rising position of the nuclear family. From the point of view of jurisprudence this is a significant departure from the basic Sunni philosophy of succession, and as such the removal of the ban on bequests to heirs must constitute one of the

most significant reforms in inheritance law that has taken place to date in Sunni Islam (Coulson, 1971: 257).

It raises an interesting historical question, which at the moment I am not able to answer, as to why the Sudan took such a radical step in modifying the Shari'a law regarding testamentary bequests, a reform which other Muslim legal systems have not adopted, although a great deal of reform has taken place in such countries as Tunisia and Syria. The close correspondence between the Sudan and Egypt is to be expected and reflects the close relationship between the jurists and the 'ulama in the two countries which has been seen in other areas of Shari'a reform. The Grand Qadi who issued this Circular was of course Egyptian, as were all Grand Qadis in the Sudan until the years just prior to independence. Was it the Sudan's relative backwardness and isolation from the centers of Islamic culture and thinking that permitted the sweeping reform? Or were the jurists in the Sudan at the center of a discussion and debate of the rules by which wills can be made and chose to have Sudan lead the way? Or, from the social standpoint, was there increasing pressure on the system for change in the direction of the increased freedom of the testator?

Transfer of Inherited Wealth Between the Sudan and Egypt

The Anglo-Egyptian Condominium arrangement by which England ruled the Sudan with Egyptian military and bureaucratic assistance caused a great many Muslim Egyptians to be resident in the Sudan for long periods of time. Likewise a large number of Sudanese migrated to Egypt as agricultural laborers or for some other work for wages which the colonialist economy brought, and lived in the country for extended periods. As a result a number of Egyptian nationals died in the Sudan and many Sudanese died in Egypt and the legal system needed to enunciate procedures for the orderly execution of decrees regarding the estates of such persons.

Circular no. 8 (1908) was an early recognition of this problem and directed the Sudanese courts to make an investigation to ascertain that none of the deceased's heirs are resident in the country. After its investigation the court should send all of the papers to the High Court of the Sudan which forwards the case to the High Court of Egypt. If there are heirs residing in the Sudan, the court may make a declaration as to which portion of the estate is allotted to them and the amount to be sent abroad.

Circular no. 15 (1914) added to this the provision that if no heirs of the deceased are found after the court's investigation, the property

of the deceased, movable and immovable, should be delivered to the government of the country where the person had his permanent residence.

Procedure and Some Simple Inheritance Cases

When a family member dies there are a number of cultural obligations to be met before the legal business of dividing the estate takes place. Death most often occurs at home and the word travels quickly from house to house so that in a short time the community and relatives are informed. The body is washed in a prescribed religious way by the husband or wife of the deceased or her or his nearest kin. There is considerable wailing and grief, the nearly universal human social response to death. The body prepared for burial, wrapped in a simple white cloth, is carried on an *angareb* (traditional bed of wood and woven rope) only by male relatives to the gravesite. Burial the same day or even within a few hours of the death is the norm, and the body is placed on its side in a reclining position facing toward the direction of the holy city of Mecca, east or northeast depending on the location in the Sudan.

After the burial there is a customary forty day mourning period during which time the immediate family sits at home and receives friends, neighbors and more distant family relations, the men receiving male visitors and the women receiving female guests. The visitor with hands open and palms outstretched greets the mourner with the expression, '*al-Fateh*', 'the way is opened'. This is in reference to the opening verse of the Qur'an, *al-Fateh*. It is expected that closer friends and relations will come repeatedly during the forty day mourning period, but all who knew the deceased or have relations with members of the immediate family are expected to come at least once. Not to do so is a deep insult which will be remembered for a long time to come.

The mourning period for a widow is four months and ten days by Qur'an prescription and during this time the widow passes through her '*idda* period (called '*idda wufa*' for a widow) which determines conclusively that there are no other heirs. A post-menopausal woman also passes through the '*idda wufa*' for it is synonymous with mourning. During this time, by tradition, northern riverain Muslim women may spin thread from which a coarse mourning cloth is made which the widow uses to cover herself.

After the mourning period has passed the heirs or their representative should come promptly to the Shari'a court to obtain an '*ilam* (decree) of heirship. The procedure for issuing an '*ilam* of heirship is outlined in Circular no. 21 (1916). First the court estimates the amount of the estate and the number of heirs. Special attention is given to any debts

which may be cleared by deductions from the estate and guardians for legal minors should be located even before the distribution of the estate. The appointment of guardians for minors is especially important if the judge thinks that the settling of the estate will take a long time. If commercial interests or large amounts of land are involved, the court may wish to conduct an investigation to determine very precisely the size of the estate and it may wish to pursue an inquiry to ensure that all of the legitimate heirs are represented. *Ilamat* of heirship should be issued promptly and any delay of a year or more after the death of the testator must be brought to the attention of the Chief Justice.

In simple cases, where the estate is not a matter of contest among the heirs, this can be done in a simple visit to the court where the estate, its total worth, and the shares to the heirs are registered and confirmed by the court. The court will inquire or may make its own investigation as to whether there are any outstanding debts which need to be paid from the estate before it is distributed. Any delay in the heirs coming to court is strongly discouraged, for estates have a way of becoming more complicated if not immediately attended to. Property or land to which there is no clear title or ownership may be used by persons not entitled under the inheritance laws and may lead to a later claim of usufruct rights. It is in the interest of the heirs to arrive at a prompt settlement of the estate.

Many inheritance cases are straightforward and require minimal intervention of the court. The following case illustrates some of the basic rules of Qur'anic inheritance:

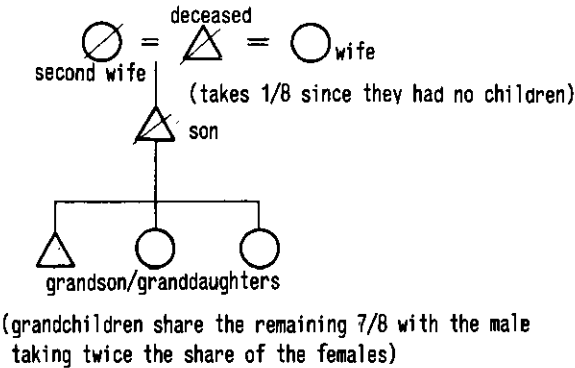
An elderly widow who had veiled herself in the presence of the court (typically Sudanese women are not veiled) came for a simple order from the court seven months after the death of her husband. As husband and wife they had no children but he had another wife who had a son and two granddaughters and one grandson. Their mother (the second wife) and the son had died leaving as heirs the widow, now in court, two granddaughters and one grandson of the husband.

The wife took one eighth since there were children of the husband and the grandchildren took the remainder with the females taking half that of the male's portion.

The widow came to court to request that her one eighth share, which was held in a house which the grandchildren were renting, be converted to cash. She was asking for £S600 as fair compensation for her one eighth portion and the grandchildren had agreed to this; as shown in a *tawkil* brought before the court. The court issued its order for the one eighth share to be converted to the £S600 as requested.

(Observed in Khartoum Province Court, 22 November 1979)

Diagram 8



The estate is distributed as shown in Diagram 8. Even though the widow had no children with the husband she is nevertheless prevented from inheriting the one quarter share a widow with no children is entitled to by the presence of the offspring from the other wife. Had the other wife survived to inherit, the two wives would each take one eighth leaving the remainder to the descendants of the deceased. The modified patrilineal system gives wives the right to inheritance but the lineal blood tie is kept strong.

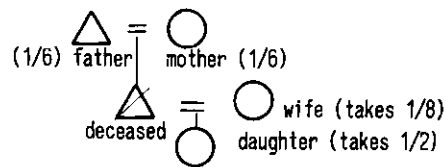
Female descendants in the patrilineal system can be the larger beneficiaries if the assemblage of heirs favors this, as in the following case:

Present in court were a young widow and her daughter and the parents of the deceased, a young man who died while working in Libya. The parents were Nubians from Halfa and only the father spoke some Arabic, so the judge slowly and painstakingly explained the distribution of the inheritance. The wife took one eighth because there were children. The daughter took half because she was the only daughter and the parents each took one sixth. The judge asked who was going to represent the interests of the daughter in her share of the estate and the mother responded that she would and the judge told them to come the next day with witnesses to make a *tawkil* assigning the mother as agent (*wakil*) for the property the daughter had inherited.

(Observed in Khartoum Province Court, 15 January 1980)

This case is represented in Diagram 9. If there are male agnates, the remainder is distributed to the nearest of the *'asaba*. The daughter, by virtue of her being the only daughter, takes the largest share, in the interests of which her mother will act as agent until she takes over the rights and use of the property or wealth at her legal majority. There are

Diagram 9



safeguards in the law to protect the property of minors as heirs, and this is discussed as a separate topic in this chapter. The equal one sixth shares for both parents is derived from the specific Qur'anic verse, 'To each of the parents goes one sixth of the inheritance if the deceased has left a child' (Sura, IV: 11). The preference for lineal descendants over the affinal tie and over the lineal ascendants is quite clear and reflects a basic priority in the system of inheritance.

Court records of estates (*terikat*) are kept in a separate ledger in chronological order and the judge signs each *'ilam* or inheritance decree which he issues. A small fee is collected from the heirs so that they may be issued copies of the decree. The record books used to be destroyed after 33 years, but it was found that doing so disrupted the historical continuity necessary for the orderly transfer of property from one generation to the next, each estate being built, in part, upon inherited wealth from the preceding generation. Circular no. 39 (1935) abolished the procedure of destroying inheritance records after 33 years.

Guardianship of the Inherited Property of Minors

In the Sudan a person is considered a legal minor until he/she has reached the age of 21 years (Supplement to Circular no. 1 (1933)). However, after the age of 18 the youth may be tested in court as to his/her ability to manage financial affairs and may be granted legal majority status before the age of 21.

The rule for selecting a legal guardian of property (*al-wasi*) is that the father is the natural and primary guardian of the minor; after him is his executor whom he appoints. If no executor has been appointed, then the role of *al-wasi* falls to the paternal grandfather or his executor. In Hanafi law the judge may appoint a guardian from among the male agnates in preference to a stranger, but no other relative except the father and the grandfather has a right to interfere with the property of a minor unless appointed by the Shari'a judge (Ameer Ali, 1894: 473-4).

The Shari'a law in the Sudan has been concerned not with the choice of legal guardian but with insuring that minors with property are not left unprotected. Judges are directed by Circular no. 1, Supplement

(1933) to locate a guardian as soon as they learn that a minor with inherited wealth is in need of such protection. A person who is legally insane (proven by a medical certificate) is likewise to be afforded the protection of a guardian. The age of a minor is to be determined by a birth certificate, if one exists, or by the testimony of medical experts, relatives or neighbors as to the time when the minor was born.

The procedure to be followed for the establishment of legal guardianship is that after the Shari'a court has issued a declaration concerned with the property of one under legal guardianship, the decree should be posted which gives the name of the guardian, his affinity to the minor, his occupation, date of decree of guardianship, the reason for the decree and the name of the minor. The decree should be affixed to the door of the court for one month in order to warn the public not to make any legal or property-related dealings with the minor. Such decrees are also published in the major daily newspapers. A copy of the decree is sent to the High Court and the Registration Office should be immediately notified to see what immovable property (land, buildings) in the name of the legal minor exists and to ensure that no transactions are made with respect to this property without the presence of the guardian and the permission of the Shari'a court (Supplement to Circular no. 1).

Apparently due to the large number of cases of guardians abusing their role as protectors of the wealth and property of the minors, Circular no. 48 was issued in 1937. Particularly singled out were the many cases of fathers selling the property of their sons and daughters for whom they are both parent (*abu*) and legal guardian (*wasi*). The Circular strictly reminds the judges that it is an illegal act for the guardian to sell the property of a minor without having been granted permission to do so by the court. The grandfather too, as legal guardian, may be guilty of such an infringement and the judges are directed to make the necessary investigation into whether the best interests of the minor are being served by any sale or transference of their property. If the investigation proves that selling the property is in the interest of the minor and that the father or grandfather is well-reputed or that it may be necessary to sell the property or part of it, then the court should confirm the request for sale of property of the minor. Otherwise, the sale should be strictly forbidden and the Registration Office should be informed of the court's decision.

The posture of the law regarding the protection of the minor is very similar to its stance with respect to the custody of children, that is for the decision to be made in the best interests of the children, the court adopting the role of guardian or overseer of the welfare of children.

*Distribution of Estates involving Land, Income-Producing
Trees and Buildings*

In practical terms more problems and tensions arise over the distribution of immovable property in estates because of its very nature of not being easily divisible. Estates involving sums of cash and other movables are more readily apportioned to the shareholders.

Land and its division for purposes of inheritance is especially sensitive as it is concerned not only with the immediate matter of the estate but with family history as well. Continuous occupation of certain parcels of land may extend for hundreds of years and naturally evokes a strong sense of loyalty and protectiveness among its residents. Among wealthier families land is owned but not worked by family members and may be rented outright or provide income from sharecropping. In any event, land is valued, even more than for sentiment, for its central role in economic subsistence or as supplementary income.

Three Circulars have been concerned directly with the registration of land for inheritance purposes and the correct procedures for the Shari'a courts to follow with respect to land claims. Circular no. 4 issued in 1905 referred to the Khedive's order of April 1897 which was connected with land disputes in the Dongola area. The Circular required land to be registered so that claims upon particular parcels of land could be clearly resolved. It is a telling point that the Sudanese government has not mandated the registration of births, marriages or divorces, even to this day, yet early in its colonial history the registration of land was put into law and made a condition for the judicial hearing of a land claim.

Circular no. 12 (1912) refers to Circular no. 4 and expands upon it with a set of procedures to be followed in inheritance cases where there are conflicting claims over land. The first rule it establishes is that land should not be divided among heirs by the judge unless it is confirmed that the land is registered in the name of the testator. If the land is not registered in his name and others claim the land, the court should gather those in whose name the land is registered and investigate the matter. If it is shown that the land in fact belongs to the testator, then it should be included in the inheritance; if it is shown that the testator is not the owner then the court will discontinue its investigation. Heirs may raise land claims in a Civil or Shari'a suit and no doubt make their choice according to the desired legal effect. It is one of the few areas where the jurisdiction of the Civil and Shari'a legal systems overlap and the ambiguity results from when the British desired to control the law regulating the use of land, but feared tampering with the traditional Islamic inheritance system.

Circular no. 22 (1916) and Circular no. 37 (1934) detail the minimum

parcels of land that can be registered and therefore inherited. Classified as 'Town' or 'Agricultural' lands, the minimum registerable town land is 25 square meters, while the minimum for agricultural lands is 300 square meters or one of the traditional measures (of 12 arrows, one eighth stick, rope or *gassaba*). An exception is made in the case of the Gezira cotton growing lands between the two Niles where the minimum is one feddan. Inherited lands smaller than these minimum amounts registerable must be converted into some other form of wealth, cash for example. The heirs with the smaller portions must come together with the heirs holding larger portions and attempt to reach an agreement which amalgamates the smaller shares into the larger holdings of land, or be compensated for the value of the small holding. If the heirs fail to come to an agreement, the Shari'a court is authorized to act on the matter, trying to ensure that all of the heirs are present, but not being barred from reaching a solution by their absence. It should be explained that it may be the case that the number of heirs is very large and to arrange a date in court for them all to be present can be extremely difficult. The court will act to ensure that just compensation is paid by the heirs into whose portion the smaller fractions of land are ordered to be incorporated. The court will notify the Registration Office to delay the transfer of the land to the new owners, the entitled heirs, until the compensatory payment(s) are made to the lesser heirs.

The complicated system of heirship in lands held for millenia, perhaps, was evidenced in the massive Nubian resettlement associated with the building of the High Dam at Aswan. The problem centered on the payment of compensation to the Nubian families about to be dispossessed of their traditional lands by the flooding behind the dam in lower Nubia and the creation of Lake Nasser. The Land Registers showed land in the name of persons who had died generations ago. The Shari'a courts were required, in a tedious and laborious process, to make retrospective decisions as to the division of heirs by stages down the ladder of descent until they came to a living heir (Hasan Dafalla, 1975: 94). A similar procedure was required for date palm trees. The Shari'a courts which directed the work of counting and assessing parcels of land and other immovable property became a target of an anti-government protest in the Halfa demonstrations of the early 1960s where sectors of the Nubian community protested the government handling of the resettlement. Protesters urged the boycotting of the courts whose work directly facilitated the resettlement (*ibid*, p. 136). This was one of the few times in Sudanese history, prior to the politicization of the Shari'a in the 1980s, that the Islamic courts were used as a symbol of political protest, whereby action against the legal system itself was urged.

Similar regulations are followed for the registration of date palm trees

for the purpose of inheritance. In the *'ilam* of heirship which the Shari'a court issues should be a summary of the estate including the shares of the heirs in date trees as well as land.

Partition of Estates – Ifrazia

Buildings that are to be divided among heirs present a special problem in that their heirs may wish to occupy their portion of the building or rent their portion to produce some income. No part of a building less than 25 square meters can be registered for inheritance purposes and a similar procedure for the amalgamation of smaller shares into larger shares is followed. Many inheritance cases which require the attention of a Shari'a judge involve the partition of estates (*ifrazia*). *Ifrazia* rules for the division of an estate or part of an estate which is not easily divisible, like a car or a store, are set forward in Circular no.25, issued in 1923.

The rules require that all of the shareholders, or a representative group of them, be seen by a Shari'a judge who can make recommendations as to the *ifrazia* or partition. If they accept the judge's recommendation, then they should sign an appropriate document confirming their consent. If some or all do not accept the recommended partition the judge is advised to review the case again to find an agreeable solution. If after the review the heirs, or some of them, still do not accept the solution then the judge is authorized to make the final decision. In conducting his investigation of the estate the judge should consider each piece of land or building separately and the share of each should be specified. The most equitable solution should be sought by adding different shares together.

In practical terms, in fact, the large number of cases involving *ifrazia* come before the courts, either the First or Second Class or the Province Courts, depending on the size of the estate. The following case illustrates the problem of an heir inheriting less than the registerable amount of property:

The two widows of the deceased came to court with two other heirs, the deceased's son and daughter. According to the distribution of the estate, which involved a house, the daughter had inherited a part of the building which was equivalent to only 22 square meters, three meters under the minimum registerable parcel of land or property. The judge advised the heirs present to bring as many as possible of the total number of heirs on another day so that a fair partition of the house could take place, and he informed the daughter that she would have to

incorporate her share with that of another larger shareholder, perhaps by selling her share.

(Observed in Khartoum Province Court, 27 November 1979)

In this case the parties seemed willing to make the necessary readjustments in order that the law be observed and the heirs feel satisfied with the settlement. Such amicability is not always the case as is evidenced in the next case where the wife as heir could not be reconciled to the provisions of the law regarding her share in the inheritance:

An old woman, despite her missing teeth, nevertheless was capable of articulating her case in the court. She was accompanied by a young woman who had been helping her with her adjustment after the death of her husband. Together they had no children, so the widow was entitled to one quarter of the estate which involved the house which they shared as husband and wife. After her, the only other heirs were the agnate males, the *'asaba*, primarily the brothers of the deceased. The house was to be divided among the *'asaba* as heirs but the widow refused to leave 'her' house.

The judge explained the law to her and the woman-friend who had accompanied her added that the division was necessary because it was all written in the Qur'an and could not be changed. The old woman became very upset and agitated and refused to accept that the house would be partitioned among the agnatic heirs. The judge, sensing that reaching a resolution that day was most unlikely, postponed the case for a month with the suggestion to the widow that she acquaint herself with the Qur'anic rules of inheritance. She was removed from the court still protesting.

(Observed in Khartoum Province Court, 16 January 1980)

The widow's not understanding the law and resisting her possible removal from the house she and her husband occupied is an emotional reaction with which anyone can sympathize. But her ignorance of the law is less understandable since informal discussion of the rules of inheritance in family consultations with the local Imam of the mosque is not only possible but is a part of everyday life. A plausible explanation is that for some reason she is isolated from her own consanguineal kin and has lacked the benefit of their counsel and other contacts with the outside world, the radio and television, which might have better informed her. Lacking other Qur'anic heirs, the strength of the *'asaba* is clear here in that the wife will take one quarter of the estate while the *'asaba* (and we do not know how many there are) will divide the remainder.

They may work out a settlement, using the method of partition (*ifrazia*) whereby the wife's quarter share will be sold by her to the larger shareholders among the *'asaba*, or where she retains her quarter portion of the house and uses it for her domicile or as a source of income.

The cases of partition are not only emotional, but can also be extremely complex when the number of heirs is very great. The following case illustrates the general problem whether it relates to a house, or land or any other immovable, not easily divisible property:

A delegation of family members came to court to attempt to rectify what they perceived as an injustice in the apportionment of an estate. Represented were one son, a wife of the deceased, three daughters and another son from the second marriage who were some of the heirs of the deceased father. The father had two wives, of whom one bore four sons, and the other had 11 children. The deceased left a house which, once divided according to all of the Qur'anic heirs, would leave the wives with less than the share of the youngest son. The house had been so subdivided that the shares were coming down to a few square meters per heir and the government will not permit the inheriting of such small shares, so the only alternative open to the family of heirs was to sell the house and divide the money proportionately among the heirs. One son was furious at the judge's decision and said that he refused to sell his father's house and that he would register part ownership of the house in the name of the heirs even if it amounted to only one square meter. The judge responded that the government would not permit this and that God had fixed the portions for the heirs in this way.

His outburst prompted the judge to call in the police who took him from the court to cool down.

The wife and other children remained in court to ask the judge what should be done. The judge advised that if the family was unhappy about his decision regarding the sale of the house, they should take the case on appeal to the *Istinaf* Court to see if his decision was confirmed or denied.

(Observed in Khartoum Second Class Court, 3 January 1980)

From a practical standpoint the government's decision to limit an inheritable share to no less than 25 square meters of land or portion of a house is correct. Otherwise, to follow strictly the Qur'anic shares means the ever increasing sub-division of property into smaller and smaller shares. The exponential growth of heirs without a corresponding growth in size and value of inheritable wealth and property is a major

problem in society which the law must resolve. It does so by making its own arbitrary rules, for example the 25 square meters limit, to restrain this tendency in the inheritance process. The refusal of the family to accept the government regulations, even in the face of the judge's allusion to the inheritance law being the word of God, illustrates the profoundly secular character of the law despite its religious base.

In a discussion of this case with one of the Shari'a lawyers he related a similar problem of inheritance in his own family involving a large piece of land adjacent to one of Khartoum's fastest growing areas, which only a generation before had been farm land. The value of the land was steadily increasing and the 75 or more entitled heirs were divided among themselves as to whether the land should be sold and the profits apportioned among the heirs, or whether they should hold on to the land as its value increased, but the number of heirs was also increasing with time as heirs married and had more children. They were faced with the choice between relatively larger shares and fewer heirs now, or increased value to be divided among more heirs in the future. At the time of our discussion they had been unable for several years to reach a consensus.

So the problem of the partition of an estate is a significant one in the contemporary Sudan, and the Shari'a courts must contend with strong and even hostile reactions to its decisions in these matters. Since all land and property owned must be registered in a government office, and property cannot be inherited or transferred without proof of registration, the only vehicle through which dissatisfied heirs can work is a government court, either Shari'a or Civil. Inheritance matters cannot be handled informally by the heirs themselves, and the estate must be cycled through the judicial system to make it valid. Once again, this procedure is at variance with the practice of other basic social institutions, namely marriage and divorce, which can be conducted without the direct intervention of the law, only requiring the presence of witnesses.

Cases of Overlapping Jurisdiction Between Shari'a and Civil Courts

Theoretically the jurisdictions of the Civil and Shari'a courts are quite separate in all matters, including property affairs. Property which is associated with inheritance, *waqf* (religious endowment), gift, wills, or *mahr* (dower) is the province of the Shari'a court; property which is sold or transferred as ordinary business transactions outside of the personal or familial sphere is within the domain of the Civil court. With the two parallel systems in practice and with the possibility of manipulating the situation of legal pluralism in the country, there is often

confusion and a lack of clear separation between the two major legal systems in the important area of property transfer.

A case involving a conflict of jurisdiction between the two legal systems reached the Civil Court of Appeal in 1961 (AC-Rev-6001961; SLJR, 1962: 101–5). A civil suit was raised claiming payment of a debt of a deceased Muslim; the estate of the dead man was at the same time being settled in the Shari'a court, which was conducting its own investigation regarding the financial affairs of the deceased. The Civil court ordered payment of the debt by the sale of some property of the deceased after its requests to the Shari'a court for the balance of the debt to be paid were met with no response. The Shari'a judge upon learning of this decision disputed the right of the Civil court to sell the property of the deceased and the Civil Court of Appeal sustained that view that the total administration of the estates, including the debts, of Muslims is within the jurisdiction of the Shari'a court alone. The Court of Appeal then set aside the wrongful sale of the property of the deceased, for any such sale cannot be conducted without the permission of the Shari'a court.

A case which properly belonged in the Civil court was contested by a number of heirs in the Shari'a court in Atbara in northern Sudan in 1959. A married woman purchased a plot of land which she registered in her mother's name so that her husband could make no claim to it. Over the years she maintained the land and made the tax payments on it. When her mother died the woman claimed the land as hers, but the other heirs contested this, demanding a share in its distribution. The heirs complained before the Shari'a court, but it was quickly determined that this was not a simple case of succession where the Islamic rules of inheritance apply. The land simply never belonged to the deceased and once this was shown with documents from the Registration Office, the heirs had no case for claiming the land (ADCC-CS-440-1959; SLJR, 1960: 34–6).

Property that is part of an estate, a *waqf* or some other area of Muslim personal affairs could have some action taken upon it in a Civil court by deceit or trickery on the part of an unscrupulous heir or beneficiary. But for the most part the cases of conflict between the courts in this area of overlap between the systems involving property are the result of some confusion. Once the confusion is clarified it simply becomes a matter of determining the appropriate court to hear the case, as with the following example:

The father of the heirs litigating this case died suddenly some 20 years previously while away in Cairo on business. As a result, his financial affairs and estate were not in order at the time of his

premature death and the family only learned years later that he owned some property in Kassala, although the family lived in Khartoum. The property, a house, only came to the attention of the heirs when those occupying it attempted to distribute it as part of another estate and when they went to the Land Registration Office they found the house still registered in the name of the father who had died in Egypt.

Those who had lived in the house all these years, thinking it was their property, raised a suit in Kassala Civil Court where they failed to prove ownership of the house by documents or witnesses. The Civil judge then dismissed the case and the family then turned to traditional politics asking important local men to intercede on their behalf. They approached the legitimate heirs and asked them to pay £S2000 to help the family which now found itself in a difficult situation, without a house and without inheritance. The house had been evaluated at £S11,000 and the legitimate heirs agreed that they would provide this sum of money because of the longstanding misunderstanding as to the correct ownership of the house.

The case then turned to a Shari'a jurisdiction solely as one of distributing the newly found property among the heirs whose father had not informed them of property held outside of Khartoum.

(Case related between November 1979 and January 1980)

The case, although complex in its origin with 20 years of history before it was ever heard, nevertheless had a simple legal solution. The only question before the courts was the determination of the proper owner of the house so the two sets of heirs could have the issue clarified for them. Once the burden of legal proof pointed in the direction of the heirs in Khartoum whose relative had died in Cairo, the case became one of simple distribution of the estate comprising the value of the house. The matter of paying the family £S2000 is not legally mandated, but is part of customary law where an aggrieved party or parties are compensated for some loss. The family, according to some agreement which had been made in the past with the deceased, was under the incorrect impression that they owned the house, perhaps by occupying it for a long time and having previously paid rent on it. Since the legal resolution leaves them worse off than before the case began, the payment of some compensation is highly appropriate. This case is but one example of an egalitarian aspect of social organization and the law which has been retained in the face of pressures to overlook collective interests, especially in the law regulating property.

Waqf – Religious, Charitable or Family Endowment

Waqf literally means 'detention', but its use in Islamic law relates to property, immovable or movable, which has been set aside by the donor (*al-waqif*) as part of a bequest for charitable or family purposes. While it shares some features in common with the Western concept of a trust, it is, in most respects, quite different from this in Western testamentary law and is perhaps best translated as religious endowment. Fundamental to the idea of *waqf* is that its motive is religious and the property nominated for the *waqf* is held in perpetuity, and belongs to God. Thus the making of a *waqf* is both permanent and irrevocable, except in Hanafi law. The other schools assert that once a *waqf* has been made, whether it be to a hospital, a school, the poor or to one's relations, it is binding and the donor is not allowed to withdraw or revoke the *waqf*. According to this majority view among the jurists, the ownership of the *waqf* is transferred immediately to the named beneficiaries. Although the basic concept is sacred ownership, the transaction is rooted in the very practical needs of the Muslim community in the natural world. The donor appoints an administrator of the *waqf* (*mutawali*) who has no vested interest in the property, unlike the legal role of trustee in the West. The *mutawali* is a manager who supervises the affairs of *waqf* execution, and he may appeal to the court for permission to sell or transfer the property so that the income it produces will be improved. When it is said that the *waqf* must be religious in motive, it is meant that its ultimate purpose is a charitable one, as humanitarian deeds are enjoined by Islam. One of the five Pillars or essentials of Islam, along with the testament of belief, prayer, fasting and making the *hajj* to Mecca, is giving funds for the benefit of the less fortunate (*al-zakat*). There is no evidence that anything similar to the *waqf* existed in Arabia before Islam. The institution, about which there has been much debate among the jurists and scholars in Islam, grew up with the practice in early Islam of followers giving their property, to remain inalienable, as a gift to charity in the spirit of the religion. *Awqaf* (plural of *waqf*) have been classified in a number of ways (cf. Ameer Ali, 1894: 193; Asaf A. A. Fyzee, 1964: 267), but for the purposes of this discussion I will use the division of *awqaf* which is followed in the Sudan.

Awqaf are classified as either (1) benevolent or charitable *waqf* (*waqf al-khayira*) or (2) family *waqf* (*waqf al-ahli*) (Circulars 57 and 58, both issued in 1970). The charitable *waqf* is by far the simpler in its intent and execution. It is made by the donor in his lifetime to a public institution such as a hospital, school, or library; very often such a *waqf* is made to a mosque, and indeed local mosques in the Sudan derive a very great portion of their income from private religious endowments.

Circular no. 57, issued in 1970, requires that the Sudan observe the Hanafi rules regulating *waqf*, so that a donor may withdraw or make any changes desired in the *waqf* during his lifetime. The Hanafi jurists further permit the heirs of the donor to cancel the *waqf* after his death. The only exceptions to this rule of revocation are *awqaf* made to mosques which are both binding and irrevocable. Here some of the original meaning of *waqf* remains intact, property held in perpetuity in the service of God and the religion. The heirs of the donor have no claim on this type of *waqf*.

The 'family *waqf*'¹ has been more controversial in recent years and has been strictly limited or even abolished entirely in some countries because of its potential for abuse of the Shari'a law of inheritance. The *waqf al-ahli* is made by the donor and during his lifetime he derives benefit from the property which he has nominated as a *waqf*. After his death the intended beneficiaries among his relations begin to derive income from the *waqf* and ultimately the *waqf* will devolve to charity after all of the named beneficiaries have died. Rights to deriving benefit from a *waqf* are not inherited unless the endower specifically mentions the descendants of the beneficiaries, but a family *waqf* held in perpetuity is not legal. The intent of the family *waqf* is also religious and charitable, to allow the endowed property to be used for the benefit of relatives in need with the expectation that the donor will be rewarded by God for his good deed. During the colonial period and after independence, with increasing capitalization and concentration of wealth in the Sudan, the number of family *waqfs* increased as did questions about their true intent.

For example there was a case in Omdurman which came to the attention of the court of a rich man who was attempting to disinherit his daughters by using the mechanism of the *waqf*, which is not subject to the legal restraint of the bequeathable third, like the Islamic will.

Whatever was the father's motive, his attempt was clearly a violation of the Qur'anic law of inheritance and the *waqf* which he initiated was cancelled once it became clear what was the real intent of the donor. All *awqaf* must be authorized in a Shari'a court by an *ish-had*,² a legal document issued especially for gifts and *awqaf*. If a legal assistant or a judge suspects an ulterior motive in nominating a *waqf* on the part of the donor, he will order an investigation that would include hearing from the heirs if the *waqf* goes beyond the bounds of the bequeathable third allowed in the drafting of wills. Apart from the possible abuse of *waqf* for circumventing the Shari'a inheritance laws, there is also the danger of the misuse or discontinuation of use of the property as directed by 'The Dead Hand', as the execution of the *waqf* in perpetuity has come to be called (Asaf A. A. Fyzee, 1964: 267). Agricultural land

deteriorates in the course of time, buildings are not properly maintained and the value of the property may well decline with the passing years so that very little income is derived from the *waqf* and therefore little profit is acquired by the beneficiaries.

These problems have been widely discussed in Islamic legal circles as a matter of reforming the law and establishing good public policy regarding the initiation and administration of *waqfs*. Many nations with predominant or large Muslim populations have abolished the family *waqf* altogether and have greatly restricted the benevolent *waqf*. The Sudan thought it was wise to retain the *waqf* in both forms, so it issued a number of regulations regarding the status of *waqf* in 1970 when both Circulars no. 57 and 58 were issued.

First, Circular no. 57 reaffirms that Hanafi law is followed in the Sudan with respect to *waqf*, so that no endowment is binding or irrevocable save the *waqf* made to a mosque or a charitable institution. The right of revocation was extended mainly to the donor of the family *waqf*. By opting for Hanafi law in this area, as the Sudanese jurists have on so many other points, they are recognizing the flexibility to alter or modify the *waqf* in the donor's lifetime or after his death. In fact the Circular specifically mentions that 'justice and equity' are served by the opinion of the Abu-Hanifa, and that the cancellation of a *waqf* may become the sole remedy to sudden economic impoverishment of the donor. The donor may, therefore, revoke all or part of the *waqf* or make any changes in the beneficiaries or in the terms of the *waqf*. The only exception to the rule of following Hanafi law in all matters relating to *waqf* is the subject of Circular no. 56, issued in 1975, which recognized the Maliki interpretation that *waqf* can be comprised of movable wealth, books or libraries, as well as immovable wealth, buildings and land. This is another feature which adds to the flexibility of *waqf* making. Transactions, such as selling or mortgaging part of the property of the *waqf*, are not considered revocation. The right of revocation extends to the donor and the named beneficiaries; the heirs who are not named have no right to revoke a *waqf*.

Revocation of a *waqf* is only possible by *ish-had*, the same legal document required at the time of the initiation of the *waqf*.

Circular no. 58 (1970) addresses more specifically the claims that have arisen especially between the beneficiaries and the appointed administrator of the *waqf*. Singled out as problem areas are: (1) the diminished return of *awqaf* held for a very long time where the property becomes less valuable and the number of beneficiaries so increased by the natural growth of families that what a person receives may be so small that it does not serve the original purpose of the *waqf*; (2) conflict between the beneficiaries, who tend also to be heirs, as to the distribution of

income among them. Such conflict is often a clue that the intent of the *waqf*-maker may have been less than benevolent with respect to his relatives, and may, after the fact, be reason for its cancellation by the Shari'a judge.

Circular no. 58 makes it clear that it is perfectly legitimate for the donor to make a *waqf* naming some of the heirs as beneficiaries of up to one third of the estate. It is also permissible to use the mechanism of the *waqf* to protect the property in his estate from the irresponsible behavior of his heirs, if, for example, among them are persons recognized as of poor character. Simple favoritism toward certain heirs is not considered a good ground for making a family *waqf*, and if this is suspected and the *waqf* is beyond the bequeathable third, the judge may declare the *waqf* void. If an heir's portion is less than what is due to him/her and he/she feels deprived, a claim can be raised which will investigate the accusation of illegitimate favoritism, and if the case is proven, the *waqf* can be voided. Judges may liquidate *awqaf* that no longer produce a satisfactory income or that are not properly maintained. In cases where the family *waqf* has been cancelled, the court should distribute the *waqf* among the beneficiaries according to the law of inheritance mandated by the religion, although this has proved to be difficult because it is another division of an estate which has already been divided before the cancellation of the *waqf* (Explanatory Note no. 4 to Circular no. 58, 1973). Beneficiaries who are not heirs are not entitled to any part of a cancelled *waqf*. Finally, the work of *waqf* initiation, withdrawal, and cancellation is the jurisdiction of First Class judges, and a separate fees and record book for *awqaf* is maintained in all courts. This streamlines the work and keeps in one place for ready reference the particular history of a *waqf*.

The law regulating *waqf* in the Sudan has not been so radically reformed as is the case with the divorce law or the law regarding the making of wills, for example. It has taken a conservative approach in the strictest sense, that of conserving the essential spirit of the *waqf* concept which is charitable, based on need, both public and familial. The regulations set forward during the early 1970s permit flexibility within the overall structure of a *waqf* (without its becoming a will), while at the same time building in safeguards against the use of a *waqf* to disinherit or reduce the shares of the legitimate heirs. The law does leave room for special consideration of particular heirs if there is just cause such as urgent need or the reprehensible behavior of one of the heirs. The law has been modernized without taking the radical step of abolishing *waqf* altogether as many countries have done. In the Sudan the tendency to misuse the *waqf* was thwarted just as it was beginning to be seen in the case law in the courts, as

Circular no.58 clearly suggests. The potential for abuse was thus, temporarily, 'nipped in the bud'.

Transfer of Property for Hiba ('Gift') or Mahr

Hiba has been translated into English by the word 'gift', but the Islamic legal conception is much narrower than the very general notion of gift in the West which is associated with particular social occasions and lacks any legal or formal structure. Very often in the West the social meaning of a gift is associated with the expectation of some return, which is very unlike the Islamic idea of *hiba*. In short, there is no exact translation, as with the concept of *waqf*, and the only recourse is to use the Shari'a term with its explanation. *Hiba* is the immediate and unqualified transfer of property without any return or expectation of return (Asaf A. A. Fyze, 1964: 209). The *hiba* may be land, or buildings, or some movable property of value like jewelry or animals. The 'gift' may be made to a relative or to a non-relative, to an heir or non-heir and it may be made in the donor's (*al-wahib*) lifetime or as a bequest after death. The specific gift and its terms are registered in a Shari'a court as an *ish-had al-hiba* so that a record of the transfer is kept and so that the court can authorize the *hiba* and determine that it is not a violation of the law of inheritance. *Hiba* which are made as part of an inheritance may require special attention if the heirs make a complaint about it, and permission to review such cases in the Sudan is obtainable only from the Grand Qadi (Circular no.13 (1913)).

Hiba may be made by a father or mother to their child, or to a longtime friend or business associate, with the terms set by the donor. With the current high costs of marriage a *hiba* may be made by the father to the son to assist him to contract a marriage. Since the greatest cost is the *mahr* or dower itself, creative means of financing the marriage like the use of *hiba* or the offer of buildings or income producing trees as part of the dower, have been used. As early as 1927 the Shari'a law in the Sudan outlined procedures, in Circular no.29, for the nomination of the dower in the form of buildings, fruit bearing trees or other property (*al-muhur al-agaria*). To offer such property in the place of part or all of the *mahr* normally paid in cash, the owner should apply to the Shari'a court for permission to do so. The exact location of the property, and the number of trees if relevant, is registered and the transfer of the property to the wife is completed at the '*agid*' marriage contract signing ceremony. The *maa'zun*, who registers the marriage, should not accept the property named as *mahr* without the written consent of the Shari'a court. If the owner of the property is not the husband-to-be, but the father or another relative, the procedure to be

followed is the same as that by which a 'gift' or *hiba* is made to the groom. The ownership of the property in the name of the donor should be terminated and registered in the name of the husband and then accepted as *mahr* if there are no objections from the Registration Office as to the size and current status of the property.

This is a procedure that is not without its risks from the point of view of the donating relative(s) if there is a dissolution of the marriage. The following case amply demonstrates this point:

The applicant in the suit was the father-in-law of the respondent who married his son 18 years previously. At the time of the marriage negotiations, the applicant went to the woman's father and asked that she be married to his son. Her father agreed and suggested a dower of £S20; the applicant said this was too low and that since the woman's family was poor he would pay the *mahr* as a gift to the bride. To this end he gave his future daughter-in-law 300 square meters of land in Shambat in Khartoum North. In 1959 he made an *ish-had al-hiba* offering the land as dower, when it was worth about £S25. The agreement about the dower was made between the parties in the house and the only official record of the transfer of land was the *ish-had al-hiba*.

After 18 years the son divorced the wife. He married again and she left the house they had built on the land received as her dower and returned to her father's house. Her ex-husband continued to live in that house on her land, so the former wife raised a civil suit against the husband whereby she succeeded in obtaining a decree of eviction against the husband, in 1978. The father, who had originally given the land, went to the Shari'a Court for a nullification of the *hiba* since the son divorced her. The land that had been worth £S25 in 1959 was now worth about £S12,000 so his motive was strong.

The respondent, the ex-wife, would not relinquish her right to the land and the house which she said she maintained and made major repairs on twice since it was built. The only official document relating to the case was the *ish-had al-hiba* and since it was confirmed in court that no conditions were placed upon the *hiba*, such as usufruct rights only or revocation of the *hiba* at the time of divorce, when it was given by the father to his future daughter-in-law, he had no case for reclaiming his land.

Since *mahr* as a debt to the woman is not returnable, and the land was given as dower, the judge reached the decision that the case should be dismissed.

(Observed in Khartoum North Province Court, 30 December 1979)

There is no doubt that this case is complicated by the fact that the value of the land has increased so markedly in 18 years, but there is nothing extraordinary about this since the same has happened to land values all over the three towns. The motive of the father to take back his gift of land as payment of the dower, and the determination of the ex-wife to hold on to her land and the house built on it both stem from the current value of the land. A simple case of the return of the *hiba* of land would have been further complicated here by the fact that there is no familial relation between the applicant and respondent as father and daughter-in-law. Such an affinal tie carries with it no real duties or rights beyond the human bonds of affection which might develop between them. Since the *hiba* was transferred to *mahr*, the case resolved itself to the woman retaining ownership of the land and property on it as the legal debt of *mahr* that had been paid to her.

Conclusion

The Islamic law of inheritance represents one of the most complicated aspects of the Shari'a, yet more than the other subjects in the law represented here, it is a key to the essential features of Islamic society. That society is patrilineal and to a large degree patriarchal, but any absolute male dominance is modified by important concessions made in favor of uterine ties and against the interests of the purely agnatic or patrilineal kin group. These modifications amounting to a reform of the strict patrilineal role of inheritance were set forth first by divine revelation in the Qur'an, and once applied as law, have developed along with the course of the development of Islamic society itself. For the most part, the position of the male agnates has not been strengthened. If anything, in the modern era, their status in inheritance has been weakened in favor of the immediate or nuclear family and kin ties through the mother. In the Sudan this shift away from the collective patrilineal kin group to the more individualized nuclear family in the transfer of wealth through inheritance, wills and *waqfs* is suggested here to be correlated with a developing capitalist economy during the colonial and post-colonial periods. I might further suggest that one reason why the Sudan did not follow the trend, so common in other parts of the Muslim world, toward the abolition of *waqfs* is that the retention of the *waqf* concept and system allows for an even greater strengthening of the hand of the nuclear family in the passing on of wealth after the death of one of its members. So the failure to abolish *waqfs*, which

might be considered a retrograde feature of Shari'a law in the Sudan, can also be seen as an element in the vanguard of social change today, the progressive replacement of the extended family by the nuclear family. Specifically the Sudan has limited the role of the patrilineal group by treating the grandfather (one of the more powerful members of the *'asaba*) as a full brother and thus preventing him from disinheriting or lessening the share of a full brother or sister. Further the Sudan has taken the unprecedented move to permit a testator to increase his bequest beyond the one third permissible in a will to favor any heir or non-heir, although, as might be expected, it is members of the nuclear family who are most often cited in such wills. The trend toward a more central role for the nuclear family in inheritance is by now very clear.

Another pattern which is detected in the Judicial Circulars is the intervention of the state, through its established legal channel governing the inheritance of land and property, to prevent and discourage the subdivision of wealth. The law limiting the amount of land and property which can be registered (Circulars 31 and 37) and therefore transferred or inherited is helpful in the practical legal concern of dividing small estates among large numbers of heirs. However, in social terms, these regulations have the effect of encouraging the amalgamation and concentration of wealth by certain family members whose class interests may well supersede kin ties. The virtually complete lack of constraints in will-making in the Sudan has the same effect of consolidating developing financial sub-groups within families that, with increased capitalist development, will eventually split off from the traditional extended family relations. Over time the trend toward the decreased significance of the *'asaba* and Qur'anic heirs in inheritance will continue unless there is a joint economic motive for retaining the status quo.

Only a decade ago businessmen wealthy enough to be called millionaires were so few in number that their family names were known to the general community. Today the wealth is more spectacular than simple millions and the number of such individuals is in the hundreds. The social transformation is visible in many ways from exclusive housing areas for the very wealthy which have burgeoned in the last decade to the imported luxury items which are symbolic of the emerging class. The law does not give free rein to this rising elite class, and the rights of the heirs in Islamic law are scrupulously guarded and protected. The exemplary rules and procedures which guard the property inherited by minors (Circulars 1 and 27) are perhaps the clearest illustration. However, the flexibility which is afforded by the applied law regarding *waqf* and wills is such that traditionally favored groups and individuals may in certain cases have their share and influence reduced by manipulation of the law.

The number of Judicial Circulars devoted to clarification of issues relating to inheritance and the transfer of property is a fair indication of the centrality of these matters in applied Sudanese law. Beyond the trends mentioned here involving inheritance, related developments in the law governing the use of property as dower in marriage (Circular no. 29) and the regulations in matters of gift-giving (*hiba*) suggest similar trends. The use of buildings or income-producing trees for *mahr* in marriage only with the permission of the Shari'a court judge indicates, by implication, the preference for a cash transaction by the date of this Circular (1927), and thus serves as one index of the shift away from traditional means of exchange to a cash economy. Gift-giving itself needs to be monitored so that it does not alter or endanger the shares of heirs who are not recipients of gifts (Circular no. 13, 1913).

The trends which are apparent in the dynamics between law and society in the Sudan with regard to wealth and property, its inheritance and transfer are: the growing accumulation and concentration of wealth; the rising position of the nuclear family at the expense of the traditional patrilineal extended family; the accommodation of the law to more individual handling of private wealth and property.

The adaptation of the law, through revision of standard principles of will-making and the retention of *waqf*, especially the 'family *waqf*,' may not be enough to satisfy the demands of this rapid expanding and extremely powerful class of economic elites. The next step which the Sudan takes may well be to secularize the law governing matters of inheritance for all Sudanese citizens, including Muslims, and adopt a model of law which gives priority to the nuclear family while permitting a less restricted right of disposition of private property during one's lifetime and after death.

NOTES

1. The English colonial records refer to the *waqf al-ahli* as 'native' *waqf*.
2. *Ish-had* literally means the thing which has been witnessed, and the legal document details this with the names of the person desiring the *ish-had* and his/her witnesses.

Grateful acknowledgment is extended to the Audio-Visual Department of Rhode Island College for the production of the inheritance law diagrams.

CHAPTER NINE

MOVEMENTS FOR REFORM OR RESTORATION OF THE SHARI'A IN THE SUDAN

REFORM, WESTERN-INSPIRED OR A MATTER OF INTERNAL DEVELOPMENT

The question of the reform of Islamic Law is at once highly contemporary and very controversial. It is a sensitive issue in Muslim regions because many argue that the Shari'a is immutable and not subject to change or reform. It is also a sensitive issue because the reformers themselves are often members of political or religious movements that are in opposition to various governments in power. Another sensitive point is that much of the criticism and call for reform has been inspired by certain Western, secularizing trends which have become unpopular in recent years. Western-based scholarship generally has applauded any move away from what is perceived as traditional Islam, and Tunisia's move to reconstruct family law more along Western lines and the Shah of Iran's personal law reform have been enthusiastically received. Likewise the return to 'fundamentalist' Islam in Iran has been lamented without due consideration being given to the political and cultural context within which this occurred. The very word 'reform' may be at issue and I use it here advisedly, preferring in certain instances to refer to change or internal developments in the law.

A countervailing trend away from reform and toward a reassertion of the basic principles of Islam and Shari'a has occurred, particularly in the last decade or more as the influence of economy, politics and culture from the West has increased in Muslim areas. The result has been a 'backlash' against these influences and a rebirth of interest in Islamic fundamentals. In a number of areas, including the Sudan, this move has taken the form of agitation for and progress toward an Islamic constitution. The debate over the reform or restoration of Islamic law in contemporary Muslim society is a lively one which at present engages both the religious 'ulama and the secular legists. Although much commentary proceeds from the West on the subject, the debate is internal to Islam and its society, and the outcome will be determined by Muslims themselves.

*Review of the Developments of Shari'a Law in Twentieth
Century Sudan*

The specific development of law in the Sudan is outlined in Chapter 1 which discusses the content of Judicial Circulars issued from the office of the Grand Qadi between 1902 and 1979. These Circulars constitute the applied Islamic law in the Sudan for the period covered including topics from marriage and divorce to the management of estates and *waqf* and a nearly complete range of subjects in the personal status law. However, the overall trends in the contemporary development of the law and the sources of the changes, both in the law itself and in society, have yet to be thoroughly discussed. It is in this context that I wish to include some of the dynamic that has occurred between legal theory and legal practice and between legal practice and social change. An essential component in this discussion is some mention of the social movements for reform or restoration of the law which have at various points injected their influence.

An important first point to make is that the perspective of this study is that development of the Shari'a in the contemporary Sudan has been, for the most part, a matter of internal evolution. The greater number of European scholars of Islamic law hold the view that various changes in the applied law are the direct result of positive, secularizing, progressive and modernist contact with the West. Colonialist rule, while criticized on a number of points, is nevertheless thought to have brought with it a measure of enlightenment and liberal, reformist philosophy. In the Sudan, of course, we are talking about a society which had been greatly transformed by the Turkish occupation, actively secularizing Islam in the nineteenth century, and the Mahdist state, which sought to restore fundamental Islam, before the British assumed political control in 1898. Certain changes in the law were already accomplished or in process. The Shari'a, applying Hanafi law, had been relegated to the personal status law of Muslims by the Turks; a system of national and district courts was in place applying law on a variety of levels, civil, commercial, criminal and family law; and a system of land and property registration for the purpose of tax collection was established for administrative and court purposes. The Mahdist movement instilled within the Sudanese who were part of it a sense of nationalism and of the power of Islam as a unifying force. British colonial rule succeeded the Turkish occupation and Mahdist reclamation, and was built upon this foundation. The English realized that the military defeat of Mahdism did not finish the movement itself and early on there was an effort to maintain continuity with certain Islamic institutions, including the Shari'a. To this end, a separate Islamic system of courts was established

with a separate system of appeals to a Shari'a High Court presided over by a Muslim Grand Qadi. Moreover the Grand Qadi was given the unique authority to issue Circulars which amounted to a local interpretation of the law of personal status. These were promulgated with the approval of the Legal Secretary, a high colonial administrative position filled by an English national. This mode of operation placed the 'Mohammedan' law courts under English authority while giving the appearance of autonomy and separate powers. Indeed a measure of real autonomy did result and, while many of the Circulars were closely tied to developments in Egypt as part of the Anglo-Egyptian rule of the Sudan, certain of the Circulars reflected change that was internal to and exclusively found in the Sudan. For example, the assertion of the Maliki principle regarding the authority of the father or marriage guardian in the contracting of a marriage in 1935 and its eventual repeal in 1960 represent unique developments of the Shari'a in the Sudan that are grounded in the Sudan's particular history and traditions. Likewise the extension of the period of child custody for a mother under certain conditions combines the Maliki traditions of the Sudanese, on which this interpretation is based, with the changing conditions of life in the country where the father's work may take him away for long periods and therefore make him an unfit custodian. Similarly the developments of the Shari'a, as evidenced through the Circulars, regarding inheritance and estates reveal a growing recognition of the gradual ascendance of the nuclear family and represent a major internal development. Even the retention of *waqf* is a significant indigenous statement of law concerning the continuing social utility of this basic Islamic institution. With respect to divorce reform, where the Sudan was a leader in the Islamic world, certain unique developments have occurred, particularly with respect to divorce because of harm or cruelty (*talaq al-darar*) and divorce in consideration of property (*talaq al-mal*).

Each of these areas will be considered in more detail, but the general point to be made is that these developments have taken place within the confines of a dialogue that is basically internal to Islam, even though many of the changes were initiated during a period of foreign rule which exerted undoubted pressures for change. The fact that the evolution of the law continued in an unbroken fashion after the end of colonialism is evidence that a certain internal consistent development has characterized the twentieth century progression of the Shari'a in the Sudan. Western influence on the law could be said to have been primarily concerned with questions of administration and 'good government' for the Muslim majority of the country, except in the areas of certain 'emotional' issues such as child marriage or infibulation. The continuation of the Shari'a solely as a personal status law in effect increased

the autonomy of the Islamic law as its application was of little import to the governance of the country. 'Mohammedan' personal law for Muslims was an excellent example of the successful colonial policy of indirect rule. The British only interfered with the direct application of the law as it related to the registration and control of land and property for the purpose of estates. Indeed, of the various campaigns which the English launched for the elimination of 'harmful social practices', the majority were entirely unsuccessful or of little effect. The efforts to curb child marriage succeeded mainly in the urban areas where increasing education for girls was bringing about a decline in the practice anyway. The British effort to curb the forced obedience of a Muslim wife through orders issued from the Shari'a court only forced a confrontation between Western and indigenous perceptions of ideal marital relations. Wishing to avoid such a confrontation the English were satisfied with the procedural compromise that a husband could obtain only three obedience rulings against his estranged wife for each separate act of her disobedience, i.e., leaving his house. Eventually the women's movement in the Sudan prepared the way for the elimination of 'obedience to the house' (*bayt eta'a*) which was accomplished by governmental action in 1970. The English campaign to eliminate the practice of infibulation ('pharaonic circumcision') culminating with its legal prohibition in 1946 was largely unsuccessful even with the support of a *fatwa* issued by the Mufti of Sudan in 1939. The campaign only succeeded in driving the practice underground, although indigenous solutions have been and are being sought to this social-medical problem. The deep impact of Western culture, despite 56 years of colonial rule, must thus be questioned. The Sudanese maintained their political resistance to foreign rule from the times of the Mahdiya to the nationalist movement, and their cultural resistance was evidenced in the reinforcement of many local traditions, even perhaps such unfortunate ones as the circumcision of girls. Likewise the Shari'a courts may have been perceived as a haven for the perpetuation of Sudanese Muslim customs as the language of the courts remained Arabic (rather than English as in the Civil courts) and the legal tradition Islamic rather than Western. Indeed the English in other parts of the African empire officially treated the Shari'a as a variety of 'native law and custom' as in Northern Nigeria, and this overall approach conveyed the impression that Islamic law was not in fact entirely colonized. Thus the policy of quasi-autonomy for the Shari'a in the Sudan coupled with a number of unsuccessful efforts to introduce Western customs or to suppress existing traditions meant that real internal development could and did take place. The 'ulama were left to their teaching for the most part, except when that teaching had political implications which were anti-government. The evidence points

more to a dialogue among the 'ulama across national boundaries than to the direct influence of the English in the development of Islamic family law. The beginning of divorce reform in the Muslim world and in the Sudan is a case in point.

The Egyptian reformers, Mohammed Abduh and Qasim Amin, both influenced progressive thought in Turkey before the first reform in the Islamic law of divorce was promulgated by Imperial Decree in 1915 and extended in the Ottoman Law of Family Rights in 1917. The Sudanese Grand Qadi at the time, Sheikh Mohammed Shakir from Egypt, had himself urged the adoption of Maliki principles regarding the permissibility of judicial divorce for women in an 1899 memorandum to Mohammed Abduh, then the Mufti of Egypt (Anderson, 1951: 272). The original Turkish law permitted divorce to wives who had been deserted by their husbands or who had been married without their knowledge or consent to a diseased or imbalanced man. The Sudanese reform, comfortably using the Maliki interpretation, introduced more extensive changes in Judicial Circular no. 17 (1915 or 1916), permitting judicial divorce for (1) lack of support (desertion implied), (2) fear of temptation into illicit relations by being left alone away from her husband for more than one year, and (3) divorce because of cruelty. In the latter case, using the ground of harm (*darar*) for judicial divorce, the Sudan became a leader in the Muslim world, anticipating what was to be a weaker interpretation of *darar* in Egypt by 15 years, and expanding its meaning to include insult as well as physical abuse while simplifying the proof of harm. Other countries have interpreted the taking of a second wife as an injury to the first; India and Pakistan have implicitly accepted this as a ground for divorce (Anderson, 1970: 44). However, as far as I have been able to determine, the Sudan, uniquely, has expanded and deepened the meaning of 'harm' in Muslim marriage beyond that which exists even in other Sunni Maliki areas. This is such that a single act of insult or harm is sufficient to cause an irrevocable breakdown of the marriage and the existence of *darar* (proven by the wife's claim, a single woman as a witness and the wife fleeing the conjugal home) permits a Muslim Sudanese woman to, in effect, ransom herself out of the marriage (Circulars nos. 59 and 61 (1973 and 1977)). These provisions are all of recent origin but they are developments based on the original reform of 1915, Maliki legal interpretation as well as indigenous perceptions of what is tolerable in a marriage and what is not.

Similar developments reinterpreting the law to permit judicial divorce took place early on in Lebanon, Jordan, Syria and are applied substantially in Israel today. Other reforms followed, differing in detail and emphasis, in India, Pakistan, Singapore and Iran in the decades up to the 1960s, while a number of states adopted a revolutionary

approach to Islamic family law, for example Tunisia and the People's Democratic Republic of Yemen (South Yemen) (cf. Fluehr-Lobban, 1980). To be sure, numerous ideological currents were responsible for these changes, but it must be said that the rapidity and similarity of the developments are staggering given the nearly 13 centuries during which divorce by women was not allowed. These events regarding divorce reform point to both a general state of cultural preparedness which existed in the Islamic world and an active dialogue within the Islamic community of 'ulama reflecting a growing if not decisive trend in favor of reform. That this dialogue or debate has taken place within the context of a world configuration which has included Western colonial occupation of the lands mentioned and more recently neo-colonial dependency is significant. But what is even more pertinent is that the changes reflect not a Western dominance over Islamic institutions, as would have existed in any wholesale conversion to a Western-based family law, but an internal evolution of the law, in the context of the changed world configuration, according to Islamic Shari'a principles.

Thus the first amendment of the Shari'a personal status law permitting judicial divorce was an enactment by the Ottoman Sultan using the principle of *siyasi Shari'a* whereby an Islamic ruler can alter the applied law in a manner which seems appropriate to community needs. The elimination of *bayt eta'a et'a* in the Sudan was similarly accomplished under the direction of a Muslim military ruler in 1970 using the appropriate governmental apparatus, the Sudan Judiciary and the Attorney General. The divorce reforms of Maliki inspiration were promoted by another Maliki principle, that of *maslaha*, or legal opinions favoring the public welfare. Increasing the protection of the legal rights of married women, including the right to divorce, has been a matter of concern to Islamic legists as traditional family patterns are changing. The Shari'a doctrine of *takhayyur* or selection from among the legal opinions of the various schools has been widely accepted as a legitimate basis for change in the law. This has been especially true for the Sudan which has on many points chosen or stated a preference for Maliki law over Hanafi law. Now throughout various parts of the Muslim world a wife can seek divorce in court on the following widely recognized grounds: (1) failure of maintenance; (2) cruelty; (3) physical desertion; (4) marriage to an imbalanced or diseased man without her knowledge or consent (Anderson 1970: 43). The existence of these grounds across nations and in various cultural settings indicates a very wide consensus among the Islamic 'ulama demonstrating that *ijma'*, that very consensus, is in operation.

As a general rule, Western culture and politics may have been the context for reform of the Shari'a but not the prime mover. While the

Chronology of Development of the Shari'a in the Sudan
1902-79

Date	Marriage/Divorce	Maintenance	Child Custody	Inheritance	Waqf	Hiba
1912				All inheritable land must be registered		
1913						Gifts must be registered in Shari'a court and separated from inheritance claims
1915-16	Sudan the first to introduce judicial divorce on grounds: (1) lack of support (2) absence/desertion of husband (3) cruelty (<i>darar</i>) (Circ. no. 17)	Procedures for maintenance claims for present and absent husband (Circ. no. 17)				
1923				Basic procedures for handling estates established (Circ. no. 21)		
				Procedure for partition of movable and immovable property (Circ. no. 25)		
1925	Husband/wife mutually inherit if no other heirs extant (Circ. no. 28)					
1927	More divorce reform on grounds: (1) <i>talaq al-ayb</i> (disease or defect in the husband); (2) <i>talaq ala-mal</i> (in consideration of property introduced) (Circ. no. 28)	Maintenance payments for <i>nafaqat al-idda</i> no longer than 1 year unless suckling a child, whereas the maximum period for <i>nafaqa</i> is 2 years 3 months (Circ. no. 28)				
1927	Emanipated woman has all of the rights of a free woman (Circ. no. 28). Procedure for <i>mahr</i> to be paid in immovable property (Circ. no. 29)					
1932	Establishes Maliki law governing consent in marriage, making consent of the marriage guardian (<i>al-wali</i>) only legitimate consent (Circ. no. 35)					
1933			Of Maliki derivation, extends period of child custody by the mother to puberty for a boy and consummation of marriage for a girl (Circ. no. 34)			

1935	Divorce reform: triple <i>talaq</i> made a single repudiation (first and revocable); moreover invalid if uttered while intoxicated, as a threat or under compulsion (Circ. no. 41)	Restatement of the independence of gifts from wills and inheritance; gifts are not subject to claims by heirs (Circ. no. 41)
1936	Legal rights of former slaves ensured through procedures that any marriage of an emancipated woman must be registered with <i>mazzin</i> and any legal case involving a former slave is to be transferred immediately to the Grand Qadi (Circ. no. 46)	
1937		
1939		Protection of the property of minors making necessary periodic reports to court by guardian of property (<i>al-wasi</i>) (Circ. no. 48) Full brothers & sisters inherit with the grandfather – equalizes share of half & full brothers – Maliki interpretation (Circ. no. 49) Grandfather treated as a brother in inheritance, so as not to disinherit full brothers & sisters (Circ. no. 51) Will-making – a will is valid if made to an heir or <i>non-heir</i> if it does not exceed the bequeathable 1/3; the individual shares of heirs may be increased provided they do not exceed the 1/3. No confirmation by the heirs is needed unless the will exceeds the 1/3 bequeathable share (Circ. no. 53)
1943		
1945		

Chronology of Development of the Shari'a in the Sudan Con'td
1962-79

Date	Marriage/Divorce	Maintenance	Child Custody	Inheritance	Waqf	Hiba
1960	Hanafi law on consent in marriage restored making consent of woman and her guardian necessary as a compromise with 1932 law (Circ. no. 34)					
1975						
1970						
1972	Legislation making consent of a woman valid if implied, not necessarily expressed.				Movable property can be part of a <i>waqf</i> Maliki law (Circ. no. 56) Right of withdrawal of <i>waqf</i> except that made to a mosque (Circ. no. 57) Family <i>waqf</i> retained but procedure established to prevent its abuse for disinheriting Qur'anic heirs.	
1973	Divorce because of cruelty expanded, using Maliki sources					
1977	Procedures established for a wife who claims cruelty in the marriage and has fled her husband's home and is therefore <i>haraj</i> , and a legally aided husband seeking support and no divorce, to effectively 'ransom' herself out of the marriage (<i>alalaq al-Jadya</i>) - expansion of cruelty ground (Circ. no. 61)					
1979		Maintenance procedures established for minors in child custody cases (Circ. no. 62)				

Shari'a in the Sudan has always operated in a political realm closely tied to the ruling government, it has nevertheless retained, or had conferred on it, a certain autonomy which has favored a gradual development or evolution of the law.

SIGNIFICANT DEVELOPMENTS IN THE APPLIED LAW OF THE SUDAN

Major developments of the Shari'a law in the Sudan are outlined in the preceding chart and are shown to cover the range of topics in the personal status law. Many of the changes are in accord with events in other parts of the Islamic world, but others are unique to the Sudan and emerged as special matters particular to the history and culture of the country.

An important characteristic of the twentieth century development of the law is the modification of the Hanafi law (which was imposed by the Ottoman Turks and continued as the official interpretation of Shari'a by the English) by the Maliki law, congruent with Sudanese traditions. Hanafi law was set aside in favor of Maliki law on the question of consent in marriage in 1932 (and then reversed in 1960); Maliki interpretations form the basis for reform of the law of divorce allowing women to petition the court for legal dissolution of marriage on a number of grounds, including, of course, cruelty, which encompasses mental as well as physical cruelty in the Sudan. The Maliki maximum gestation period of four years was replaced by a one year gestation period and the maximum life span of 90 years waiting period of the Hanafi law was changed to four years in order that a wife could have her missing husband declared legally dead and thereby free herself to marry again. The nomination of movable wealth as part of a *waqf* was an addition to the applied law in the Sudan, preferring the Maliki interpretation to the Hanafi on this point. And the Maliki interpretation of 'equality of standard in marriage', mentioning the exclusive condition of equality in religion alone as establishing equivalency in marriage, replaced the less egalitarian Hanafi law in a landmark case in 1973 which decided that two young people could marry in spite of the allegation that there was slavery in the background of the man. While Shafi'i and Hanbali law are mentioned in Circular no. 56 on wills, the two main schools which comprise the contemporary legal interpretation of Shari'a are the Hanafi and Maliki schools. Moreover the Sudan represents a unique blend of these schools in that the existence of the Judicial Circulars has permitted an avenue whereby Hanafi law has replaced Maliki law in a classic example of *takhayyur* or selection of opinion from one of the schools. This case involves the special history of the question of consent in marriage in the Sudan which saw the reversal of the Maliki position under the pressure of social agitation. As the phenomenon of suicide

among young girls objecting to forced marriages was an increasing social problem, the Women's Union sent a petition to the Grand Qadi demanding a reconsideration of the question of consent in Islamic marriage. The result was Circular no. 54, which made the contract void if it was proven that the girl had not been consulted before the marriage. Even this reversal was incomplete in the sense that henceforth a valid marriage in the Sudan combined the essential features of the woman's consent of the Hanafi school with the consent of the father or marriage guardian of the Maliki school.

Beyond the important developments in the law regarding divorce reform, maintenance and the contracting of marriage, significant changes in the law affecting inheritance and the transference of wealth have also been witnessed. A major modification of the inheritance law affecting the rights of mutual inheritance between husbands and wives was introduced in 1925 (Circular no. 26). After this reform husbands and wives, in the absence of any other heirs, could inherit the full estate of the deceased spouse instead of the previous provision that the remainder of the estate go to the *Bayt al-Mal* or General Treasury. This striking measure, anticipating a similar development in Egypt by 20 years, opened the way to even more dramatic reforms in the inheritance law as applied in the Sudan. In 1939 the Sudan undertook to resolve the problem of the lack of equality in inheritance of the full and half-brothers and sisters which is a characteristic of Hanafi and Hanbali law. Circular no. 49 equalizes their share and in doing so once again adopts the Maliki interpretation (also that of Shafi'i) as the best solution to this dilemma. Another pioneering step was taken by the Sudan in 1943 which modified the Hanafi rule that the grandfather excludes all collaterals (i.e., brothers and sisters) in the rank order of succession. Instead the grandfather was placed on a par with the full and the half-brothers and sisters where he, in effect, inherits his share as a full brother and takes the remainder if there are no other *'asaba* or agnatic heirs. This is accomplished with the stipulation that no matter what the circumstances, the grandfather receives his Qur'anic one sixth share. Egypt and Syria followed the Sudan in this reform in 1943 and 1953 respectively.

The question of wills received innovative treatment in 1945 in a major Circular dealing with guidelines and limits of the law in writing and executing wills. Working within the framework of the Qur'anic provision that one third of an estate is bequeathable by will apart from the prescribed shares, Circular no. 53 provides that a will is valid for up to one third of the estate for an heir or non-heir, the latter being an entirely unique addition. Moreover the shares of individual heirs may be increased beyond their Qur'anic proportions to one third of the estate

which can be done without the confirmation of the other heirs. If the testator wishes to increase the share of an heir to more than one third, this is also possible provided that the heirs give their consent in court. Only Egypt and Iraq have followed the lead which was established by the Sudan in giving the testator a greater freedom to dispose of his estate in a manner which is appropriate to the needs of his heirs. This was the clear intention of the reform and represents a significant departure from basic principles of Sunni inheritance and is a remarkable development in the applied Shari'a.

The law regulating *waqf* in the Sudan, while modified in a number of areas, has nevertheless retained the essential features of *waqf* nomination, contrary to trends in other parts of the Islamic world. The charitable *waqf* made to a mosque is both permanent and irrevocable (Circular no. 57 (1970)); however, a *waqf* may be withdrawn or changed during the lifetime of the donor or cancelled by the heirs after his death, in accordance with the Hanafi rules regulating *waqf*. The 'family *waqf*' has been subjected to the greatest modification due to the potential for its abuse in disinheriting legitimate heirs. Circular no. 58 (1973) alerts the Shari'a judges to this potential and recommends that the judge direct an investigation if there is some suspicion that a *waqf* may be nominated as a means to deny an heir of all or part of his/her share. In cases where this is confirmed by the investigation, the judge is authorized to cancel the *waqf*. Otherwise the *waqf* itself, as an Islamic religious and legal institution, is retained in the Sudan for the original benevolent purposes for which it was intended.

The applied law in the Sudan has been very careful to separate gifts made to relatives from questions of inheritance, with specific mention of this in Circulars as early as 1913 and again in 1935. The concern has been to insure that gifts (*hiba*) are registered and that no claim on gifts of a personal nature will be made by any of the heirs.

The law regarding *hadana* (child custody) was changed in favor of the more liberal Maliki view, allowing a mother to retain custody of her son until the age of puberty and her daughter until the consummation of marriage, providing that good cause be shown (Circular no. 34 (1932)). The protection of the property of minors is governed by regulations set forth in 1937, and minor children who are the subjects in custody cases are protected in terms of their right to maintenance in Circular no. 62 (1979). The law now provides that the concern of maintenance for the child be the first order of business in any custody case.

In outline form, the foregoing constitute the major developments in the substantive law as interpreted by the jurists and 'ulama in the Sudan using for the most part Maliki and Hanafi scholarly texts and opinions. Together they constitute an evolving body of law that is

responsive both to changing juristic thinking in the Muslim world and to social forces within the Sudan. In a number of areas the law has shown an innovative capability and active use of the principles of *ijma'*, *istislah*, *istihsan*, indicating that the opening of the '*bab al-ijtihad*' had fresh implications for the Sudan.

Regional Influence of Sudanese Legal Developments

The Sudan and Turkey were the first Muslim countries to introduce legal reform allowing judicial divorce for women, in 1915. The mutually developing aspects of applied Shari'a between the Sudan and Egypt during the Condominium have already been discussed, and it is clear that change in the law moved from south to north along the Nile Valley as often as it moved from north to south.

The Sudan was the first country to institute judicial divorce because of cruelty in 1915 and its progress and expansion have been one of the hallmarks of the development of Shari'a law in the country. However, other Muslim countries, particularly in North Africa, which share the Sudan's adherence to Maliki custom, have also allowed divorce because of cruelty, including Libya, Algeria, Morocco and Tunisia. The developments in the Sudan and Egypt in the 1940s extending the right of the testator to make bequests outside of the strict laws of Qur'anic inheritance in favor of nuclear family members or heirs in need were followed by similar developments in Syria and Iraq in the 1950s.

The evolution of the law permitting divorce in consideration of property, including the more common *talaq al-mal* where the wife forfeits her debt of *mahr* in return for divorce from her husband, in addition to the traditional right of negotiated, or *khula*, divorce is notable in the Sudan. However, the ability of the wife who has been subjected to harm in her marriage in effect to ransom herself out of the marriage, using the concept of *fidya*, is, to the best of my knowledge, unique in the Muslim world. Also unique in the Islamic world is the existence of women judges in the Shari'a court system in the Sudan, while this is specifically prohibited by law in Egypt, for example.

From a legal and social perspective, the Sudan has had a special historical relationship to Saharan West Africa, particularly Northern Nigeria. Successive waves of pilgrims making the *hajj*, taking this route to Saudi Arabia, have temporarily resided or permanently settled in the Sudan and have been both a source and a reinforcement of Maliki custom in the country. When the period of indirect rule ended in Nigeria and the Muslim North saw the attenuation of the comprehensive application of Maliki law in both criminal and personal status law, it was the mode of applied law already in practice in the Sudan which was

recommended and accepted. The Sudan Penal Code (itself based on the earlier Indian Penal Code) was adopted in principle and Shari'a family law according to the Maliki school was retained. The only additions to the criminal law were the retention of Islamic penalties for illicit sexual relations and the consumption of alcohol (Anderson, 1973: 82). As Northern Nigeria considered modifying its *waqf* law, it sent a delegation to the Sudan in the late 1970s to study the developments of the law regarding *waqf* during the active period between 1970 and 1975 when three separate Circulars were issued on this subject.

Thus in the predominantly Muslim regions with which the Sudan shares certain aspects of its culture and history, the Sudan has exerted an influence on legal development and in turn has been influenced by trends in the larger Islamic community. Where the spread of Islam is traceable directly to contact with Sudanese Muslims, for instance in the Nuba Mountains in the southern Sudan, to a limited extent, and in Uganda, the rites and customary practice of Islam associated with the northern Sudan exert a dominant influence. This subject cannot be alluded to without mention of the historical antagonism between sections of the Muslim community in the north and the non-Muslim southerners where religious differences tend to conceal the more basic problem of uneven development between the north and south.

SHARI'A IN THE SUDAN AND OTHER MUSLIM REGIONS COMPARED

The status of Islamic law in the contemporary Sudan is conditioned by the nineteenth and twentieth century history of the country which gave the Shari'a a monopoly in the law governing the personal status of Muslims, a practice initiated under Turkish rule and continued by English colonial rule into the post-independence period. In the early 1980s the Sudan Judiciary underwent revision whereby the Civil and Shari'a courts amalgamated into a single legal system with a unified appeals process.

Throughout the Muslim world, especially in Asia and Africa where colonial governments prevailed during much of this century, a similar picture is presented where the Shari'a, confined to matters of family law, was administered through a primarily secular court system linked to the colonial administration. In Egypt the Shari'a courts were separate from the national courts until they were amalgamated in 1956. In India the Shari'a law of personal status has been administered through the Civil courts for nearly two centuries. In Northern Nigeria, where Islamic law was treated as a variety of 'native law and custom', the Shari'a was given a certain autonomy which it did not enjoy elsewhere, applying a more comprehensive law than simple personal status law. In Algeria

the Islamic courts are only courts of first instance and appeals are made to judges in the Civil courts (Coulson, 1964: 163). Islamic law as state law in its full interpretation is applied without restrictions in Saudi Arabia, according to the Hanbali school, and in Pakistan, according to the Hanafi school and Libya has recently moved to bring its constitution and law into conformity with the Shari'a. Only Turkey (in 1924), Tunisia (in 1955) and Egypt (in 1956) have abolished the Shari'a courts, and in the latter two cases the Shari'a forms a substantial basis of the revised legal systems. And in the cases of Morocco, Tunisia and Northern Nigeria their traditional systems of Islamic law had been preserved virtually intact until recent times (*ibid.*, p. 156). The move in the Sudan to combine the Civil and Shari'a courts has its precedents in the Muslim world both as a means of systematizing the work of the national courts and of bringing about the influence of the Shari'a in the national law. Egypt, for instance, has determined that the Shari'a will constitute the principal source of legislation in its latest revised constitution.

After the Turkish–Sudanese–Egyptian breakthrough in family law reform in the early decades of this century another surge of legislation paralleled or exceeded the developments in these countries with the Jordanian Family Law of 1951, the Syrian Law of Personal Status of 1953, the Tunisian and Moroccan Codes of Personal Status in 1957 and 1958 respectively, followed by the Iraqi Law of Personal Status in 1959 and a major reform in Family Law in Pakistan with the Family Law Ordinance of 1961. In 1967 Iran promulgated its Family Protection Act as a feature of the Shah's 'White Revolution', but these measures have been substantially repealed since 1979. The 1970s witnessed a number of radical reforms of the Shari'a inspired by leftist regimes with the Family Laws of the People's Democratic Republic of Yemen (South Yemen) in 1974 and Somalia in 1975 (Anderson, 1976; Fluehr-Lobban, 1980). Each equalizes the rights and responsibilities of women and men in marriage and divorce, and Somalia has equalized the shares of women and men in inheritance. It is noteworthy that in the majority of these cases the reform or radical reform of the personal status laws has accompanied major developments in government, either as new independent nations or as new progressive or revolutionary regimes.

It has been in the area of civil and criminal law as well as commercial law that the Western legal tradition has had its greatest impact. While indigenous social institutions were placed under stress by Western occupation, the relative autonomy which was afforded the Shari'a has enabled a certain free development of the law on its own terms, albeit in widely varying circumstances. Developments which have taken place in the Sudan have been paralleled in other Islamic regions and certain overall trends are apparent for the evolution of the law as a whole.

Divorce and Reform

Since the opening of the *bab al-ijtihad* or 'door of interpretation', which took place in the context of the transformation of Islamic society itself in the last century, a number of specific changes or amendments to the Shari'a are evident. Since 1915, in Turkey and in the Sudan and later in the majority of Muslim countries, judicial divorce may be granted to women on a number of grounds, mainly lack of support and the resulting fear of moral turpitude on the part of the woman, disease or defect in the husband and ill-treatment, these grounds being of Maliki derivation. Such reform in the law regarding the possibility of judicial divorce for women has had an inhibiting effect on the absolute right of the husband to repudiate his wife which had become, in the words of one Muslim author, 'a one-sided engine of oppression in the hands of men' (Asaf A. A. Fyzee, 1964: 125). Reform has been most extensive perhaps where it was needed the most, as the reprehensible triple pronouncement of divorce, final and irrevocable, had become all too common a means of discarding or threatening wives; it has now been modified and made more difficult. Indeed divorce reform in the Muslim countries can be viewed as a needed corrective to the social problems of neglect and easy divorce. Thus after Turkey and the Sudan instituted divorce for lack of support and disease or defect in the husband, Egypt, Lebanon, Jordan, Syria and Palestine introduced similar reforms in light of their historical ties to the Ottoman empire although the original Turkish law was repealed in 1919 after only two years. The Sudan was the first to introduce divorce because of cruelty, in 1915, and in the course of the twentieth century development of the law, the Maliki principle recognizing cruelty or harm as a ground for divorce was substantially applied in the Maghreb, Libya, Tunisia, Morocco, Algeria, and also in Iran, although there it was a Shi'a reform. Recent change in the Libyan law in 1972 apparently reverses some previous gains and places husbands 'in many respects in a more advantageous position' than in pre-Qaddafi regimes (Meyer, 1978: 30–49). In Algeria a woman can obtain a judicial divorce because of proven adultery on the part of her husband, the more fundamental ground being *darar* or harm caused to her. In Tunisia a woman can obtain a divorce without grounds simply because she wants it, provided that she pays her husband compensation for their separation. It is only in the Muslim countries of Tunisia, Algeria, the People's Democratic Republic of Yemen and Somalia that divorce pronounced outside of a court of law is invalid; however, the African countries of Mali, Guinea (Conakry), Ivory Coast and Tanzania, with substantial or dominantly Muslim populations, have also made this move with respect to the reform of the divorce law. The number of countries which

have taken this step in the past twenty years or more is sufficient to establish the requirement that a divorce be in court as a significant trend in the development of the law. In a unique form the Shi'a law in force in Iran prior to the 1979 revolution permitted the divorce of a wife on the grounds of 'the impossibility of reconciliation', the husband's taking a second wife without the consent of the first, or any disease in the husband, or his conviction in a court of law, which adversely affects the family honor (Anderson, 1970: 51). The *'idda* waiting period of three months, which insures that a divorced woman is not pregnant, appears not to have been affected by any reform legislation and remains a basic feature of Muslim divorce.

However, in the main, throughout the Muslim world, the right of the husband to repudiate his wife unilaterally has not been undermined and it remains an issue on the agenda for reform. A number of groups in the Sudan, including the Sudanese Women's Union, the Communist Party and various individual reformers have called for the forbidding of divorce outside the court, a direct assault on the unilateral right of repudiation. The Republican Brotherhood Movement has called for the right of repudiation to be bilateral, taking away the husband's sole prerogative. Nevertheless this right is viewed by orthodox Islam as one established in the Qur'an and *sunna* and is therefore not subject to reform or modification. Nonetheless the modifications in Islamic law regarding divorce have occurred, in many cases within the practice of official, orthodox Islam using Shari'a principles, showing a trend toward the increased ability of a woman to obtain a divorce.

Marriage and Polygamy

The crucial issue in the Sudan regarding marriage has been the question of consent in marriage, whether that consent be the woman's or her guardian's, which depends on how the law is interpreted. The Shari'a has evolved to a position which insists on the consent of the woman and that of her *wali* (marriage guardian) who should be her father or agnatic relative; or, if he refuses, a Shari'a judge can act in this capacity. One critical appraisal of the effects of the present state of the law notes that many women are still threatened with isolation from the family if they refuse their father's choice of a husband; moreover, most women are not seen by the *maa'zun* before the marriage and are too timid to embarrass their fathers by refusing the marriage at the point of the *'agid* wedding ceremony (Dina Sheikh al-Din, 1981: 46). The question of polygamy has been addressed repeatedly by the original Sudanese Women's Union, and its offshoot of the same name linked to the single political party, the Sudanese Socialist Union; polygamy has also been

taken up by the Sudanese Democratic Women's Union¹ and the Republican Brotherhood Movement. A number of specifically Islamic-inspired reformers cite the Qur'anic passage in which it is said, 'Marry those women who seem good to you, two, three or four, but if you fear you cannot do justice to them then marry only one' (Sura IV: 3). This latter section they take to be, in effect, a prohibition of polygamy since it is humanly impossible to treat two people, let alone two wives, with absolute equity.

Nevertheless the issue of the reform of the law allowing polygamy remains a controversial one, particularly so because it has been a focus of criticism of the Shari'a as a whole, stemming from the West. Despite such pressures, the institution of polygamy has been abolished in only two states, in Tunisia in 1957 where it has been hailed in the West as a wise and progressive step, and in the People's Democratic Republic of Yemen in 1974, where it has been largely ignored. President Habib Bourghiba made the interesting comment at the time of the promulgation of the law in Tunisia that polygamy was 'not consistent with the present stage of development of our Islamic civilization' and therefore had best be discarded as one of the remnants of an earlier historical period (Anderson, 1973). The Muslim practice of polygamy has likewise been abolished in the African states of Guinea and Ivory Coast, but the acceptance of polygamy in Islam is often taken as one of the reasons for its popularity and spread in Africa as opposed to the more restrictive Christianity.

Elsewhere in Muslim regions polygamy has been restricted, with Iran, India, Egypt and Pakistan giving the first wife the right to judicial divorce if the husband marries again without her knowledge or consent. The Moroccan, Iraqi, Pakistani and Syrian laws require the permission of the Shari'a court for a polygamous union and this is granted only if it is shown that that husband is financially capable and no injustice to the first wife is feared.

In the Sudan, although the issue has been raised by various social constituents, the law has not responded in any way to limit its practice among Muslims. Whereas the law has evolved a definite position favoring the nuclear family in inheritance, it has not seen polygamy as an issue to be confronted or modified. Even the religiously conservative Hanbali law, in force in Saudi Arabia, permits a legally binding clause of monogamy to be written into the marriage contract on the premise that God allowed polygamy but did not command it. So far we are lacking studies of the extent to which this marriage option is exercised in Saudi society.

The consent of the wife, the subject of such controversy in the Sudan, appears to be a nearly universal feature of Muslim marriage and the

Hanafi interpretation prevails widely, except where it is modified in Maliki areas by the relatively stronger role of the marriage guardian. The payment of *mahr* as part of the marriage contract is less controversial today than the inflated amounts which are now required by social pressure to be paid. Heterogeneity in marriage by family, class and regional variation is still relatively rare in the Sudan and in Muslim areas generally, and the strength of *bint 'amm* marriage (with *fabrda*) remains at the base of a highly endogamous pattern. However, the growing number of marriages in court points to a potential break with traditional ties effected through marriage and represents a potential trend which needs close observation in the years to come.

Child Custody and Maintenance of Children

On this subject, the Sudan again has been a leader in introducing liberal interpretations regarding the care and custody of children. In 1932, Circular no. 34 set aside the Hanafi interpretation that the custody of the mother ends at age seven for a boy and nine for a girl and adopted the Maliki provision that the mother can retain custody of her son until he reaches puberty and the daughter until the consummation of her marriage if the welfare of the child is better served. Egypt, which, like the Sudan, applied Hanafi law in this respect, issued an amendment to the original law of 1929 which provided that these ages might be increased to nine and eleven respectively due to the number of complaints which had been received from women (Anderson, 1976: 142). The most recent changes in 1979 have brought Egypt into line with the Sudan on the matter of child custody, albeit 47 years later.

The principle of 'the best interests of the child' operates in these two cases and in the Muslim law generally where custody by the mother may be extended for longer periods for the welfare of the child. Tunisian law, which applies the Hanafi interpretation rather than the Maliki, adds the provision that custody can be extended if the judge finds it more beneficial to the child. Iraq also applies Hanafi law and the judge may exercise discretion considering the best interests of the child. The Moroccan law applies the Maliki interpretation, naturally enough as this school predominates in the Maghreb.

The Family Law of People's Democratic Yemen has taken the unprecedented step of allowing the mother to continue her custody, up to the age of ten for a boy and fifteen for a girl, even if she has remarried, unless the mother or her new husband is shown to be totally unfit to provide the necessary care (ibid, p. 143).

The maintenance and guardianship of the child may not always be in the hands of the custodian of the child, and very often a *wasi* or

guardian of the property of the child is the father or one selected from among the agnatic kin. Circulars nos. 27 and 48 (1936, 1937) have dealt in detail with the procedures to be followed by the courts, stressing vigilance with respect to the proper management by guardians of the property of their wards. The courts likewise strictly enforce the payment of *nafaqa* to children, and Circular no. 62 (1979) specifically addresses the maintenance needs of the children whose cases are being litigated in the courts. For the mother in the Sudan whose custody of her children has reached the Maliki limits, her wages as a custodian cease and she must rely on her own means and the support of her family to raise the children, although the father may continue to support his children informally.

The Jordanian law of 1951 provides that the mother must support the children if the father is destitute, rather than the paternal grandfather, as according to traditional law. The Tunisian law also states this preference for the mother over the paternal grandfather. The South Yemeni law imposes equal responsibility on the two parents in support of their children with the stipulation that this varies according to their means.

The corollary duty of children to support their indigent parents has not appeared much in recent legislation, although it has been enforced in the courts in the Sudan.

Inheritance Laws Amended

The Sudan and Egypt were yet again among the pioneers in the modification of the Shari'a Law of Inheritance, and developments in each country closely paralleled one another during the Anglo-Egyptian Condominium. In 1943 legislation in Egypt and Circulars nos 49, 51 and 53 (1939, 1943, 1945) in the Sudan strengthened the hand of the nuclear family in inheritance by equalizing the shares of half and full brothers and sisters and by putting the strong agnatic relation of the paternal grandfather on a par with the brothers such that he inherits with them. This prevents the grandfather from taking more in inheritance as a member of the '*asaba*' while it strengthens the position of *awlād al-umm*, the children of the mother, irrespective of their status as non-agnates. This was followed by similar acts in Iraq (1959) and in Syria (1953). The Tunisian reform law of 1959 gave the Qur'anic heirs the right of the return (*al-radd*) at the expense of the '*asaba*' so that even a daughter or a son's daughter would exclude a close agnatic collateral relation. Effectively inheritance was limited to the nuclear family, paralleling the trend established by the Sudan and Egypt.

At a rather early date, the Sudan gave full rights of inheritance to

either a husband or wife, when either died without leaving any other heirs (1925). This modified the prior Shari'a rule that a husband or wife takes his or her share and the remainder is absorbed by the Public Treasury. Egypt followed this move 20 years later in 1945 and Iraq in 1959 but I am not aware of equivalent legislation in other Muslim areas which have not otherwise substantially altered their personal status law. Somalia, for instance, has equalized the shares of men and women in Islamic inheritance although this was highly controversial, and it remains doubtful whether the law is in force.

The Sudan and Egypt also pioneered the expansion of the Islamic capacity to make wills up to one-third of the estate. The two countries made legal bequests to heirs or, for the first time, non-heirs in 1946, and the Sudan took the unprecedented step of allowing such bequests to exceed the one-third permissible in the Shari'a provided that the heirs of the testator approve of this in court. Each of these measures further strengthened the position of the nuclear family by permitting individual bequests on their behalf as part of the legitimate act of will-making in Islam. The capacity to make wills has always been a Shi'a doctrine and was adopted by Iraq as it made Shi'a law in inheritance applicable to all Iraqis.

Egypt, Tunisia and Morocco have passed legislation making obligatory bequests up to one-third of the estate in favor of orphaned grandchildren so that they would by law inherit from their grandfather. In the Sudan the matter of bequests in favor of orphaned children has been less of an issue than the protection of the rights of legal minors in consideration of property which they own. This concern has focused on governance of the *wasi*, or one responsible for the management of the financial affairs of the minor.

The established trend enhancing the position of the nuclear family in Muslim inheritance is not so much a break with the Shari'a as a continuation of the reforms in the strictly patrilineal system which prevailed in Arabia in the Jahiliya, before the coming of Islam. Islam amended the strict system of exclusively male succession by adding women as a class of heirs as well as males who are related through women. This is traditionally considered as a reform brought by Islam in favor of women, and so it is, but it also began the process of recognizing the central position of the nuclear family by admitting its female members to the ranks of Qur'anic heirs. The rise of the nuclear family, however, is linked more to the growth of concentrated wealth in Islamic society; thus this trend is more recent. Nonetheless the pressure will stay on the traditional system of inheritance so that the priority of the *'asaba* will be further undermined, while lineal relations and especially the nuclear family will be more favored in inheritance.

Agitation has already been witnessed, and will continue, to equalize the shares of females with males and to strengthen the inheritance relationship between husband and wife in spite of the presence of other heirs, especially those outside of the nuclear family.

In this respect the attitude of various Islamic countries toward the traditional institution of *waqf* (religious endowments) is most revealing. Relatively speaking a larger number of states have abolished or limited the system of *waqf* than have retained it in full. This move has especially affected the so called native or family *waqf* (*al-ahli*), intended as a benevolent bequest to family members. India has exerted an almost total ban on *awqaf* and, during colonial times, Aden Protectorate, Kenya and Zanzibar severely limited the making of *waqfs*. The states which have abolished the family *waqf* include Egypt (1954), Syria and Tunisia, while Lebanon has seriously restricted it. The Sudan has retained both the charitable or religious and the family *waqf* although the latter has been subjected to vigorous guidelines to prevent its abuse with the intention of disinheriting heirs. This follows the Maliki view that impartiality should govern testamentary dispositions regarding children and that a *waqf* made to sons, excluding daughters, is void. It is interesting that the development of the Shari'a in the Sudan has permitted the addition of amounts to the shares of heirs, while it has defended the traditional rules of Islamic will-making.

Overall we are lacking in good comparative studies of the development of Shari'a law of personal status in various African, Middle Eastern and Asian countries. J. N. D. Anderson, the compiler of this comparative material, is the acknowledged expert (1950; 1951; 1970; 1976). There is a great need for precise and current information on a number of topics in the law beyond the better-researched law of marriage and divorce. Child custody law, for instance, as applied in the Sudan and Egypt, is quite different. The applied law in other regions is unclear, except where we have specific studies, as in Israel (Layish, 1975) and India (Asaf A. A. Fyzee, 1964). Likewise the important area of the maintenance of women and children (*nafaqah*) is in need of good comparative research, especially in the crucial area of the enforcement of the law.

At the level of society, rather than the superstructure of law, we need to know the effects of legal reform on those who are to benefit from it. A key feature in such studies should be a keen awareness of the roots of the reforms, whether from above or below. In the Sudan, the impulse has often been from below and the law has responded. In this respect it is of interest to see the real effects of the Iranian 'White Revolution' of the Shah which included legal reform of the personal status laws subsequently rejected by the popular Islamic revolution. Likewise the reforms in the family laws, prompted in part by Mrs Sadat, should

have been studied in terms of their real effect and reception in Egyptian society before their abrogation in 1985. Thus questions of legal development are inseparable from political development and the progress of society.

The Politics of the Law and the Methods of Reform

Law reform has often been a clarion call for the construction of a new society, or the announcement of its arrival. The close relationship which exists between politics and law can be witnessed in the movements for reform of the Shari'a which have attended critical moments in the various political histories of the Islamic areas under discussion. The law as superstructure and abstraction becomes concrete in its application and governments have used various changes in the law to serve them as legitimation of a policy, or even of the entire regime. Thus the Shari'a has been a symbol and a tool used by reformers and more orthodox citizens alike.

Law is part of government, although it may pretend to be above it. Religious law enjoys a special status for it is served by the sanctions not only of the state but of the supernatural as well. Islamic law is all the more complex because its foundations are religious while its practice is deeply secular, especially as it has been confined to personal status matters in the modern period. This seeming contradiction is not always an antagonistic one and the Shari'a has maintained its separate identity since the onslaught of colonialism and progressive Westernization. Indeed it shows definite signs of a resurgence, and is at the center of many political controversies today regarding increasing or decreasing Islamic influence.

Contrary to the views of a number of Western Orientalist specialists in the law, I believe the motivation for reform has been inspired as much by internal developments as by Western influence. While the Shari'a law has operated in a politicized arena, the methods for its development, its reformulation, have been, for the most part, Islamic. A number of Arabic terms have developed to characterize juristic method in Islamic law and the legitimate means by which valid legal opinions may be reached. Among the most commonly referred to are:

1. *takhayyur* – selection of opinion from one of the Muslim jurists or from one of the schools of Islamic law
2. *ijtihad* – independent interpretation
3. *taqlid* – the opposite of *ijtihad* characterized by strict adherence to the doctrines of the ancient scholars
4. *istihsan* – seeking the better solution

5. *al-maslaha al-mursala* – in the interests of the common good; for the betterment of the Muslim community
6. *talfiq* – ‘patching’, piecing together an opinion from a variety of sources.

Despite the frequent assertion that the Shari‘a is rigid and inflexible, based on the notion that the fundamental sources of the law, the Qur’an and *sunna*, are in themselves fixed, nevertheless a continual study of the sources has taken place. Particularly as Islamic society has faced occupation from outside, the process of study, of reflection and reconsideration of the Qur’an and *sunna* has occurred. The *Zaharia*, those who take the literal meaning of what has been written, have been distinguished from those jurists and learned ones who have exercised the method of independent or collective reasoning. The fact that Islamic law has not been codified into a single book or series of volumes, but is based on the original sources and the scholarly tradition, has been used to denigrate the law as a whole. The reference to ‘Qadi Justice’ among Western writers has been synonymous with the capricious or arbitrary application of the law. Indeed from another perspective the lack of codification is an asset and an aid to a flexible interpretation of the law without the need for continual revision and amendment. Historically the only codification of a school of law has been that of Hanafi law in the *Majella*, Law of Obligations, which was drafted for administrative purposes of the Ottoman empire in the second half of the nineteenth century.

In terms of the independent use of judicial reasoning to effect changes in the law, by far the most common method employed has been that of *takhayyur*, or selection of legal opinion. In the Sudan, in every case where the Hanafi law has been rejected in favor of the Maliki doctrine, *takhayyur* or selection has been used. These changes were implemented through the unique mechanism of the Judicial Circular in the Sudan. In the aforementioned *Majella* of Ottoman Turkey, the determination of legal points rested with a selection of opinion from among the Hanafi jurists or some other school of jurisprudence (Anderson, 1976: 48). Again in the case of the Circulars the Sudan used the mechanism of selection and extended its meaning to choice of any opinion from any of the Sunni schools, even doctrines advocated by early jurists before the schools of law evolved as such, as in the case of Circular no. 51 (1943) which puts the grandfather on a par with the full sisters and brothers. Here the Circular uses as a legitimate source for its inspiration ‘the fact that many *saheban*, companions of the Prophet, had suggested this including Zeid, or Ibn al-Thabit’ (Fluehr-Lobban, 1983: 126). In another instance the opinions of Hanbal and Shafi‘i are recognized as ‘valid

and effective' with respect to the rules governing the making of wills. On the subject of the contemporary statement on the subject of *waqf* in the Sudan (Circular no. 57 (1970)), the learned Grand Qadi chose to quote Abu Hanifa at length to justify the continuation of *awqaf*, of both the charitable and family types, although the latter had become quite controversial. The relative harshness of Hanafi law regarding divorce is mentioned in Circular no. 59 (1973) in an effort to explain the expansion of the law regarding cruelty or harm as a ground for judicial divorce while it cites the Maliki view not only of harm in marriage but of its proof by upright witnesses. It cites the view of al-Khattab, a Maliki jurist, that the testimony of a single good woman who used to visit the house of the husband and wife is acceptable and thus adopts this view as Sudanese practice. In each of these cases the principle of *takhayyur* was employed to effect change and to develop the law in the twentieth century. In this respect there has been a notable absence of *taqlid*, the rather conservative approach to the writings of the ancient scholars as fixed.

The term *talfiq* has been used, not always in an admiring way, to describe the 'patchwork' of legal opinion that results from combining part of a doctrine of one jurist or school with part from another. Anderson (1976: 56) cites the example of the Judicial Circulars nos. 49 and 51 in the Sudan as *talfiq* in so far as the opinions of 'two companions', Abu Yusef and al-Shaybani, followed by both Shafi'i and Maliki jurists, and Zeid Ibn Thabit, are used to construct the law which limits the role of the grandfather in inheritance. The Egyptians similarly adopted measures combining different sources when they revised their system of *waqf*.

It has been in the area of marriage and divorce reform that the principles of *ijtihad*, independent interpretation, and *maslaha*, the common weal, have figured in importance. The promulgation of the divorce laws in Turkey, the Sudan and Egypt, as we have seen, was prompted by a spirit of reform traceable to nineteenth century writers. The elimination of polygamy in Tunisia was justified on the philosophical basis that such an institution, along with slavery, is incompatible with modern life. At the same time the Qur'anic verse on polygamy was also used as legitimation for its abandonment on the ground of the impossibility of equal treatment among co-wives, thus providing a sharp example of the use of *ijtihad* to bring about an entirely new version of the law. There is no question but that the Sudanese elaboration of *darar* as a ground for judicial divorce is an example both of *ijtihad* and *maslaha*, for in the introduction to the most recent Circular on the subject (no. 60 in 1973) the jurists refer to the social problem of women who have fled their husband's home because of cruelty in

the marriage and then are penalized by losing the right to maintenance. The solution to the problem, the development of the principle of *fidya* or ransom in divorce, is seen as both *istihsan*, finding the best solution, and as generally promoting the best interests of contemporary society. A similar motivation is found in the attitude of most current systems of Muslim law toward the question of child custody, where the welfare of the child, and by extension of the future society, is given high priority. Likewise the principle of *istihsan* most probably served as a motivating force behind the reform in the law regarding *waqf*, especially the family *waqf*.

As the discussion of the role of the Shari'a in the new Egyptian constitution was under way in the mid 1970s, whether it would be 'a source of legislation or *the sole* source of legislation', a number of contemporary thinkers entered the debate. One provocative article in *al-Ahram* in 1971 declared its opposition to making the Shari'a the sole source of legislation because 'it would direct our society from the effort of finding solutions to our problems (*ijtihad*) and lead to an attitude of stagnation and blind acquiescence (*taqlid*)' (al-Utaifi, *al-Ahram*, 14 July 1971, quoted in O'Kane, 1972: 141). There are others who would set limits on the function of *ijtihad*, confining it to the opinions of the learned and competent scholars, responding to Divine Will, not the wishes of the people (S.M. Yusuf, 1978: 20). *Ijtihad* thus has its controversial aspect in the current dialogue over reform or restoration of the place of the Shari'a in Muslim society.

The genesis of reform is not a uniform process and has mixed with politics, whether as grass roots movements or as reform originating from the top. In the Sudan, certain changes in the law are directly traceable to agitation by organized political groups, for instance the question of reversing the Maliki position regulating consent of women in marriage and the elimination of *bayt eta'a*. The original Sudanese Women's Union, an outgrowth of the Communist Party of the Sudan, had a major role to play in agitation for reform in their popular magazine of the 1950s and 1960s, *Sot al-Mara* (Voice of Women), and the People's Revolution of October 1964 brought the case of women's rights to the forefront of Sudanese politics. Contemporary Muslim jurists have admitted the influence of this popular movement on the development of their legal opinions in these matters.

In other respects the motivation for changing the law appears to have been problems emerging from the conduct of business in the courts which were conveyed to the High Court through the ordinary channels of judicial administration. The expansion of the law on cruelty in marriage (Circular no. 60) refers to the increase in such cases and purely legal problems associated with them. The developments in the law governing

maintenance of women and children grew out of cases where women were left destitute, yet not divorced and therefore unable to marry again, with the resulting need to solve their pressing economic problems. Thus Circular no. 17 begins the process of locating the husband, securing his property for maintenance and providing the means for the woman to divorce the husband who has deserted her. Other *nafaqa* rulings have increased the amount available to the wife and improved the means by which the government enforced judicial rulings on *nafaqa*. Other measures have protected the functioning of the courts, by restricting cases dealing with arrears of *nafaqa* to no more than three years' eligibility.

Another major force for change in the Sudan is the close political, cultural and historical relationship with Egypt, and, as we have seen, a very large number of reforms and changes in the law have occurred in close association with its Nile Valley partner. And this relationship, in the period from 1898 to 1956, is to be measured in terms of the actual political unity which the English imposed in the colonial entity of the Anglo-Egyptian Condominium.

This mixing of elements, both social and political, is no doubt characteristic of change in the law witnessed elsewhere in the Islamic world. However, major legislative reform in a number of situations has closely corresponded with important political shifts. Thus the important reform in the Egyptian family law occurred in conjunction with the political upheavals beginning in 1919 and continuing into the 1920s. The massive reorganization of the national courts in Egypt, formally eliminating the Shari'a Courts, was part of a modernizing move after the 1952 Revolution by the Free Officers' Movement. Fundamental changes in Tunisian law came with the start of national independence in 1956 and the construction of a new society under the leadership of Habib Bourghiba. The Algerian national liberation movement resulted in independence in 1962, and the promulgation of a new constitution which both reasserted Islamic rules and established legal equality between the sexes. A similar revolutionary transformation attended the reformulation of the family law in South Yemen with the success of the national liberation movement in 1967 and the passing of the new law in 1974. Somalia effected similar sweeping changes in the law, except they stemmed not from the popular base of national resistance, but from above and a core of military rulers. Iran's 'White Revolution' had all the weaknesses of a 'top-down' reform, especially as it was associated with a widely despised monarch.

Other countries have followed the course of a move toward gradual evolution of the law, as in Syria, Iraq and Pakistan and also the Sudan until 1983, although the advocates of a more radical reform or restoration of the Shari'a prefer more dramatic change.

Movements for Reform or Restoration of the Shari'a in the Sudan

The politics of the status of the Shari'a in the Sudan reflects the overall political history of the country. From the time of the defeat of Mahdism in 1898, it was only four years until the structure of the 'Mohammedan' courts was laid down in 1902. It is politically significant that the Grand Qadis appointed were Egyptian nearly until the time of independence and that the Sudanese judges tended to come from the northern Sudan where the anti-Mahdist Khatmiyya sect of the Mirghani family prevails. The Mirghani family has until the present time favored unity with Egypt, while the supporters of Mahdism reject this.

If an ideology can be said to have evolved among the twentieth century practitioners of the law, it could be characterized as both progressive and pragmatic. With many of the judges trained either at Gordon Memorial College in Khartoum (later the University of Khartoum) or at al-Mahad 'Almi in Omdurman, a mixture of influences, both Islamic and Western, combined to bring about this approach. Given the politicized nature of Islamic matters in the Sudan after the Mahdiyya, with the *Ansar* and their ideologues effectively isolated, the 'ulama and the leaders of Islamic orthodoxy took on a distinctly centrist character. The Egyptian Grand Qadis certainly promoted such a stance and their presence at the head of the Shari'a section of the Sudan Judiciary was not generally viewed with antagonism, but as an opportunity for greater benefits and status through a close association with Egypt and Al-Azhar University, itself the center of Islamic legal studies (Mohammed Omer Beshir, 1974: 113). The 'ulama and Shari'a judges who did favor close contact with Egypt on the basis of Islam alone did, however, run the risk of countering a popular mood which favored separation and independence from Egypt throughout the colonial period. After rejecting unity with Egypt at the time of Sudanese independence in 1956, the sentiment for unity of the Nile Valley has nonetheless remained alive as a political issue. The close personal-political relationship between former President Jaafar Numeiri and President Anwar Al Sadat, and after him President Hosni Mubarak, resulted in the announcement of a proposed integration between the two nations in 1982. While mainly for defense and mutual protection of the regimes, the proposed integration could affect political and cultural life as well with wide-ranging implications for the law.

The Islamic establishment, for the most part, was not active in nationalist politics which helped to launch the main political movements and parties in the Sudan. The Shari'a itself, and its future in the Sudan, did not become an issue, in any major sense, until after independence. Various groups which were to play a role in the political debate revolving

around the reform or restoration of the Shari'a and in the call for an Islamic constitution, were formed during the period preceding independence. At opposite poles on every question, including the Shari'a, have been the Sudanese Communist Party, founded in 1946, and the Muslim Brotherhood Organization in the Sudan, founded in 1954. Both political organizations developed through contacts made by Sudanese students living in Cairo, but it was more often the Communist Party that took the lead with the Muslim Brotherhood often reacting to it.

The Communist Party in the Sudan and its Attitude to the Shari'a

The Communist Party was responsible for the first politically organized group of women to emerge in the Sudan through the founding of the Women's Union in 1946. Indeed the Communist Party was the first party to open its membership to women and to establish full social and political equality for women as one of its goals. The Women's Union focused its activities on the nationalist question and on the formation of trade unions in the economic sectors where women were employed primarily in the teaching and nursing professions. Through their magazine *Voice of Women* they began to educate and even began campaigns against certain harmful social practices affecting women, such as unrestricted divorce, circumcision and the practice of facial scarification. They were to describe polygamy as a form of 'legalized prostitution' and called for its elimination in modern society.

However, for much of its history the SCP engaged in political struggle for its own legitimate existence and its work among women was organizational offering a progressive outlook on social questions that was never anti-Islamic, but always against the Muslim Brothers. It is a well-known fact that the Secretary-General of the SCP, until his execution in 1971, opened party meetings with the *fateh*, opening section of the Qur'an, 'In the Name of God, the Merciful and Compassionate'. Through the agitation of the Women's Union a number of reforms were effected in the Shari'a, as already mentioned, but the Union was also instrumental in achieving a number of reforms positively affecting women in the civil law, including a three month maternity leave policy, and equal pay for equal work, both of which are in force for the small percentage (about seven per cent) of women formally employed. The direct participation and even death of members of the Women's Union in the 1964 October Revolution, resulted in the major reform of the law giving women the right to vote. In the aftermath of the Revolution, during the parliamentary period before the military coup of Jaafar Numeiri in 1969, the first and only woman elected to parliament was Fatma Ahmed Ibrahim, a noted communist and a founder and head of the Women's Union.

With the onset of the 'May Revolution' in 1969, Numeiri came to power with the support of progressives, including the SCP and the Women's Union, and in the period 1969–71, before the coup and counter-coup which changed the orientation of the regime, Numeiri instituted the reforms which directly affected the application of the Shari'a, including the abolition of *bayt eta'a* in 1970 and the increased *nafqa* and its improved means of enforcement. Even before the coups of 1971, the SWU had withdrawn its support of the May Revolution due to its failure to meet the full demands of the Union; Numeiri responded by dissolving the women's organization.

The Shari'a official legal community was disturbed by these events for it was the first time a secular government had amended the Islamic Shari'a without using powerful Muslim intermediaries. They complained that the propaganda associated with the reforms was leading to confusion in the courts as to whether *ta'a* (obedience) existed at all in Sudanese Muslim marriage. After the events of 1971 which took Numeiri away from this progressive course, the Shari'a establishment promoted the legislation in 1972 which clarified what was meant in the Shari'a by consent in marriage to counteract the trend, which they observed, of women claiming lack of consent to a marriage which was consummated, where even children were produced.

For the Communist Party, after 1971, the struggle for its very existence became paramount with three of its major leaders executed in 1971 and hundreds more imprisoned. In the wake of the formation of the Women's Union attached to the Sudanese Socialist Union, the original leadership formed the Democratic Women's Union which has continued its agitation for reform of the law, among a host of other social questions, in the recent period. In 1979 I saw hundreds of students attend a public lecture by Fatma Ahmed Ibrahim at Cairo University's Khartoum branch, on the subject of the rights of women and the Shari'a. She began by outlining many of the rights which women are afforded in the original sources, the Qur'an and *sunna*, which are not a part of the law as currently practiced. She reviewed the history of the Women's Union and emphasized that *Voice of Women* was still published and could be heard on a variety of issues affecting the personal status law, among them the following proposed reforms in the laws:

(1) *zowaj* – marriage. The girl must have the right to choose and the bride and groom should appear together at the signing of the marriage contract. In that contract should be the right of the woman to divorce so that by law each has the same right. The *mahr* should be no more than £S1.00, and it should only be a symbol.

(2) *talaq* – divorce. Divorce should only take place in court and unilateral divorce by the husband should be disallowed. The husband

and wife should appear together in the court and the judge should try by traditional means to reconcile them, but if this fails they should be divorced in the presence of witnesses, notable people from their families or neighborhood or village. Without such witnesses only the first divorce should be allowed (*talaq owal rajia'*), and Christian Sudanese should be permitted to divorce under national law.

(3) *nafaqa* – maintenance, and *hadana* – child custody. The mother should be able to retain custody of her children and her remarriage should not affect this natural right, while the maintenance of her children by their father should continue as long as they are dependants.

The position of the Democratic Women's Union is that there is not, in this period, a major contradiction between Islam and Marxism in certain fundamental areas, such as the establishment of the rights of women within a just society. The historic role of the original Women's Union and its effect on politics and law has been eclipsed in the past decade by a different organization of the same name attached to the Sudanese Socialist Union, the only legal party of the May Revolution. Since 1971, the Democratic Women's Union has worked in an atmosphere of illegality or semi-legality and as a result it has not had the means to reach the mass audience that its successor has.

The Women's Union of the SSU

After 1971 the Women's Union was reorganized by a presidential committee and became the Women's Union (SSU) with leadership directly appointed by the president. Nafisa Ahmed al-Amin was made Secretary-General, and one woman Minister and one Deputy Minister were appointed by the regime in an effort to demonstrate its continuing commitment to women's rights. By 1973 a number of women had been elected to the SSU National Assembly and it became clear that a prerequisite for joining the Women's Union was support of the regime. By 1975 grandiose claims of a membership of a million women in all provinces with literacy, domestic skills and job training programs were announced. Mrs. Nafisa was replaced as Secretary-General by a renegade member of the older Women's Union, Dr. Fatma Abdel Mahmoud, but her inefficiency and lack of attention to the purpose of the Union resulted in her removal in 1979 and the reinstatement of Nafisa A. al-Amin, who increasingly took on the role of social critic more concerned with the plight of women than support for the regime.

In the May 1979 triennial conference of the SWU/SSU the leadership of the organization acknowledged its own failure and set about yet another reorganization. Suad Ibrahim Issa noted that more than half of the SWU's proclaimed projects did not even exist, while Hajja Kashif noted that claims of a 20,000 membership in the Union in Red

Sea Province exceeded the census figures for the number of women in that province by 2000.

It is a telling point with respect to the changed political role of the Union, that during the decade since its inauguration it has not effected change regarding the status of women in any major legislation. Individual members talk of the need for reform in the personal status law, but no programmatic statement has been forthcoming from the SWU/SSU. There is a frank admission of the decline in the strength of the women's movement during the past decade. On the other hand, this period has been an active one for the Islamic right which has, in its stead, been quite influential in the drafting of legislation intended to restore the 'rightful' place of the Shari'a in Sudanese society.

The Muslim Brotherhood in the Sudan

It is almost a cliché in Sudanese politics to say that events are triggered either by the Muslim Brothers or the Communists, before the May Revolution of 1969 and even to a large extent after it, despite the illegality of these organizations. The Muslim Brotherhood in the Sudan was founded in 1954 after contact between the original Egyptian group and the Sudanese was made during an official visit from the former at Khartoum University. Thus the Sudanese Muslim Brotherhood was established more or less as a branch of the Egyptian Brotherhood which antedated it by several decades.

The Muslim Brotherhood, whose central *raison d'être* is maintenance of the purity of the Shari'a, grew in the Sudan at the time of its achieving national independence when a number of political forces were already at work. This explains their rapid but limited growth among sectors alienated both from Western, secularizing trends and from traditional Islamic politics of the Mahdist *Ansar* or the adherents of one of the various Sufi *uruq*. The brotherhood appealed to an urban, literate group and rapidly developed a following among students who perceived the growth of the popularity of Communism as a fundamental threat to their Islamic beliefs. Very much in response to the leads taken by Communist youth in secondary schools and universities, the Muslim Brotherhood emerged as the religious alternative and student elections came to be dominated by either Muslim Brother or Communist candidates. In the 1950s a group calling itself the Muslim Sisters emerged in reaction to the growth of the Women's Union which was widely seen as Communist-inspired, and they promoted traditional Islamic values for women which did not include public allies and demonstrations, or votes for women. In an interesting turnabout, once the vote for women was secured after the 1964 Revolution, the Muslim Brothers put forward their candidate Thuria Umbabi, a woman, to oppose the Communist

candidate, Fatma Ahmed Ibrahim, who won the election in 1965 along with a number of Communists in the Graduates Constituency. After the May Revolution the Brotherhood suffered a period of political repression in the early years of the regime only to be restored to legality in the years after the 1971 Coups. In this period it enjoyed electoral victories at the University of Khartoum Student Union and controlled Omdurman's Islamic University until it was unseated in 1980, perhaps because of too close an association with the May regime. An indication of this association was the appointment in the late 1970s of Hasan al-Turabi, head of the Muslim Brothers, as Attorney General. The movement is currently attempting a political comeback, but faces competition from new, more vital Muslim groups including the Islamic Revival Committee and the *Ansar al-Sunna* (*Sudanow*, November 1980).

Although anti-Communism has been a hallmark of the growth and history of the Muslim Brotherhood in the Sudan, the movement also levied attacks against the entrenched and sometimes corrupted traditional religious hierarchy. In their adherence to Qur'an and *sunna* alone, with the former subject to new and clearer interpretation, and the latter to be expunged of all its false claims, the Brotherhood could claim to offer a modern approach and freedom from tradition. Likewise they deprived the traditional jurists of their sacred cloak by insisting on the historicity of their sources alone and thereby undermined their claim to monopoly on religious thought (Mitchell, 1969: 238). For a fresh interpretation of the sources *ijma'* and *qiyas* could be employed in the promotion of the public interest, that being in the construction of a genuinely Muslim society which most would agree had not existed since the earliest years of Islam. In such a society the retention of certain *hadd* punishments (those fixed by the Qur'an), such as cutting off hands for theft, would be justifiable in so far as this punishment could only be meted out if a thief committed this crime once it was shown that society had provided him with all of his needs. In this sense the ideology of the Brotherhood could be said to be at once both conservative and revolutionary in its call for the restoration or construction of a true Islamic society in a theocratic state.

The movement disdains imitation of the West, which was one of the principal anathemas of its founder, Hasan al-Banna in Egypt, with the notion that the establishment of the true Shari'a would help to preserve cultural identity and national pride (*ibid*, p. 242). So the movement has favored the call for an Islamic constitution, a move utterly rejected by the southern politicians and their constituency. Indeed the Muslim Brotherhood, which was very active during the first military regime of General Ibrahim Abboud (1958–64), took part in a campaign which had as its intention the mass conversion of the southern Sudanese

population to Islam as a 'solution' to the civil war between north and south. Failure to resolve the southern question was one of the major contributing factors to the October Revolution in 1964 and the first item on the political agenda in its aftermath.

The Movement for an Islamic Constitution

The Muslim Brotherhood has been one of the leading voices in the call for an Islamic state, and its general configuration was accepted with the Qur'an acting as a source for both constitution and law with the executive ruler bound by the leadership of Islam and the will of the people. But the Muslim Brothers were joined by other forces in the Sudan on this question. In 1956, prior to independence, the last Grand Qadi, Sheikh Hassan Muddathir, proposed that the Sudan be governed by an Islamic Constitution because 'the Sudan is an Islamic country; its social organization is built on Arab customs and Islamic ways' (1956: 1). In 1959 a joint statement by leaders of the Umma and Kahatmiyya sects was issued which called for the Sudan to be an Islamic Parliamentary Republic with the Shari'a as the fundamental source of legislation. The military takeover by General Abboud in 1959 brought this process to a halt; however, Abboud's policy to 'unify' the country was to mandate the spread of the Arabic language and Islam in the south.

Following the October Revolution which overturned the military regime in 1964, the movement for an Islamic constitution continued with the National Committee to establish a Constitution recommending that the constitution of the Sudan be derived from the principles and spirit of Islam and that the Shari'a should be the basis of all legislation (*Sudanow*, November 1979: 12). Again political events brought this move to an end with the coming to power of Mohammed Ahmed Mahjoub, who in 1968 dissolved the Constituent Assembly which had made the recommendation.

The second Sudanese military regime of Jaafar Numieri, after 1969, took a middle position which advocated both regional autonomy for the south and a constitution based on the principles of Islam. After the Addis Ababa Agreement of 1972 which negotiated an end to the 17 year civil war between north and south, the country moved to establish a Permanent Constitution in 1973 which was legislated through the newly created party of the May Revolution, the Sudanese Socialist Union. Article 16(a) of the Constitution declares: 'In the Democratic Republic of the Sudan, Islam is the religion and the society shall be guided by Islam, being the religion of the majority of its peoples and the State shall endeavor to express its values'. Article 16 further states that 'Islamic law and custom shall be the main sources of legislation, while personal matters of non-Muslims shall be governed by their personal laws'. Islam,

Christianity and 'heavenly religions' are equally protected (Fluehr-Lobban, 1981: 76).

The recognition of Islam and the Shari'a as the principal sources for new legislation represents a bow to the 70 per cent Muslim majority in the country with regional autonomy and personal laws, in theory, protecting the substantial 30 per cent minority. Nevertheless, with wider public discussion of an Islamic constitution in recent years, the fears of the minority Christian and southern communities have been aroused and a number of formal and informal statements opposing the Islamic constitution have been forthcoming from leaders in these communities. Additionally a large number of Sudanese Muslims oppose an Islamic-based constitution because of the multi-religious, multi-cultural composition of the Sudan, and because it is being promoted by political groupings which could generally be described as right of center.

Nevertheless a number of highly specific bills introducing Islamic principles into aspects of Sudanese national law have been put before the People's Assembly. These bills are the work of the Committee which was formed in 1977 by presidential appointment to revise Sudanese laws and bring them more into conformity with Islamic teachings. The first bills introduced dealt with the prohibition of the sale and public use of alcohol, despite the questions raised about the application of the law in the south and among the sizeable non-Muslim communities living in the north. Another bill makes the Islamic tax, *zakat*, lawful. Significantly another bill sought to repeal section 6 of the Code of Civil Procedure (1974) which allows a judge to apply 'equity and good conscience' where there is no specific legal provision, and instead to base legal judgement on the Qur'an and *sunna*. The 'equity and good conscience' phrasing was introduced by the English, but it has traditionally been used to decide upon cases in customary law for which no law or precedent exists. The proposed change if put into force, would have the effect of undermining Western-based Civil law in the Sudan as well as customary law. The proposed introduction of the *hudud* or required Qur'anic punishments for theft, adultery and forms of usury which include cutting off of the hands, stoning and flogging have had a more difficult time passing the People's Assembly and have not moved beyond the stage of initial proposal. However, with the kind of specific legislation already mentioned, the process of moving toward an Islamic Republic has never been more advanced in this century. But any attempt to institute Islamic government will have to contend with the counter-vailing pressures of renewed frustration and anger from the southerners and the outspoken criticism of the Islamic constitution in the Sudan by non-Muslim communities and progressive Muslim Sudanese.

Other countries bordering on the Sudan have taken similar steps, so

the Sudan is by no means isolated from the events and historical trends facing the Muslim regions of Africa and the Middle East. The rise of what is now referred to as 'Islamic fundamentalism' and various religious reform groups has been attributed to the social effects of periods of rapid economic and social change bringing about a certain dislocation that results in a return or desire to return to the fundamentals (Haj Bilal, quoted in *Sudanow*, November 1980: 40). Others ascribe the current activity of Islamic political groups to an old schism between Islamic orthodoxy and popular or Sufi Islam with the latter attempting to break their traditional isolation from mainstream politics. The formation of the Sudanese Islamic Revival Committee in 1978, comprising a number of the Sufi organizations, is a significant development in this respect.

Similar events are occurring in Egypt, and Libya has, as of 1972, legislated and enforced a constitution based on Islam. In the Libyan case Islamic Shari'a has been restored to a comprehensive law and all matters civil, commercial and personal are decided exclusively on the basis of Islamic teaching. The *hudud* have been restored, with careful attention to the proof of such crimes to which they might apply. The relatively small and homogeneous Libyan population has mounted little opposition to the Islamic revival move by its leader Muammar Qadhaffi although this was an issue in the proposed union between Egypt and Libya in the early 1970s.

The Egyptian case is more problematic and the work of the Committee to introduce Islamic principles into the Egyptian constitution has been going on since its inception in 1971. At the outset of the work of the committee came a plea from the Rector of Al-Azhar University that 'the constitution proclaim the official state religion is Islam ... and that it [Islam] be the source of the laws and regulations which are to govern our new life on the basis of science, of action, of faith, and of morality' (O'Kane, 1972; 138). The debate focused throughout on whether the Shari'a would constitute a *principal* source of legislation or *the* source of legislation, and after much heated argument, the outcome settled on the latter. Nevertheless opposition has come from many sources including leaders of the sizable Coptic and other Christian minority communities as well as political opponents of the government leaders sponsoring the move. Voices have been raised from the professional community of women including government ministers, seeking assurances of legal equality for women and men. Indeed this question has arisen with respect to the drafting of an Islamic constitution in the Sudan as well, whereby critics have raised the point of the contradiction within the Permanent Constitution which declared all citizens equal irrespective of sex (Article 9) yet allows family matters to be resolved on the basis

of Shari'a 'which does not always cater to the rights of equality' (Dina Sheikh Al Din, *Sudanow*, January 1981: 46).

The revival of Islam in a variety of forms in Egypt, not the least of which has led to the assassination of Sadat and a series of political trials of new Muslim sect leaders, has become one of the central, if not the most important, social question of the day. While numerous Islamic political religious sects have burgeoned, virtually leaving the older Muslim Brotherhood behind in the dust, the official work of the committee to establish the Shari'a as the basis of the law moves at a slow pace with few major developments. Meanwhile the reform in family legislation promoted by Sadat in 1979 has left both Muslim 'fundamentalists' and social reformers unhappy for different reasons, in effect, the opposing views of too much versus too little reform. In 1985 this reform legislation was repealed under pressure from religious forces.

So the call for an Islamic constitution in the Sudan and in the region generally is not idle preaching. It is consummately political while at the same time a deeply personal and sensitive issue for the majority of Muslims. The Islamic constitution is part of the wider discussion of the role of Islam, indeed of religion, in the modern state in the Middle East and Muslim Africa and Asia. It is a subject which is happily debated in the public domain, but approached with extreme caution in terms of practical politics.

The Republican Brotherhood Call for Revised Shari'a

A major call for the revision of the Shari'a within an Islamic context has come from the Republican Brotherhood (*Ikhwan Jamhuriyyeen*), a uniquely Sudanese movement. Founded in 1945 by Mahmoud Mohammed Taha as the New Islamic Mission its central ideology is fixed on the difference between the earlier Meccan and later Medinan texts of the Qur'an, the latter basically repealing the former in their view. The earlier texts contained within them the high moral precepts of equality and dignity for all human beings, while the Medinan texts, which have accounted for a large measure of interpretation of the social legislation by the jurists, have not lived up to the ideals expressed in the traditional Shari'a. 'The second Message of Islam', as the core of this philosophy is called, involves the concept of an evolving Islam from the Medinese to the Meccan level so as to construct a society where equity and social justice prevail and democracy and socialism are reconciled (Republican Brothers Pamphlet, 1981: 36).

Particularly emphasized is the Jamhuriyyeen claim of the lack of fundamental human rights in the Shari'a as it is applied today in the rule of law, the lack of rights of women and religious minorities making

it 'totally untenable and unworkable anywhere in the modern world' (Abdullahi Ahmed el-Naiem, 1982: 4). The Shari'a of today is anachronistic in the sense that it was appropriate to an earlier stage of human development, but not to the present time. The evolution (*tatwir*) of Islamic law is not only desirable but necessary for its continued viability. This is not a question of reform, but revision of the Shari'a using its own most basic sources. Reforms which have occurred in the Sudan and other Islamic states are inadequate because they 'are either secularly oriented or too superficial to achieve any degree of real Islamic social, economic or political reform' (ibid, p.6).

Selected for special consideration in this respect is the status of women in the contemporary applied Shari'a which befits the conditions of society in the seventh century, not the twentieth century, according to Republican Brotherhood thought. The limitations on the rights of women are based on specific Qur'anic and *hadith* texts, including inferior matrimonial and inheritance rights, limitation of capacity to testify or denial of competence to assume high ranking judicial or political office, and are not in need of apology or justification, but of abrogation (*naskh*). The process of abrogation simply involves the practice of *ijtihad* in matters governed by explicit texts in the Qur'an and *hadith*, a technique which is explicitly barred within the framework of traditional Shari'a. The evolving body of jurisprudence would nonetheless be Islamic Shari'a because it would still be based on the two fundamental sources.

A pragmatic rendering of the program of the Republican Brotherhood movement involves the following specific revisions in the Shari'a law: (1) the cancellation of the function of the marriage guardian (*al-wali*) with the right of the bride to contract herself in marriage taking priority; (2) the right of divorce is to be equally shared and is contractual so that an impersonal and shameful court appearance on either part is avoided. The system of marriage arbitration is retained; (3) the polygamy of the 'First Message of Islam' is to be strictly prohibited in the 'Second Message of Islam' except in rare cases of barrenness or illness in the wife (Republican Brothers Pamphlet, 1981: 38). In practice the Jamhuriyyeen marry each other with a symbolic payment of £S1.00, with other members of the movement acting as the legal witnesses and marriage guardian.

Because the philosophy of Mahmoud Mohammed Taha violated existing Islamic orthodoxy on a number of points, specifically declaring the established opinions of the *foqaha* and the Shari'a legal experts to be null and void and to be replaced by the 'Second Message of Islam', the works of the Republican Brotherhood and its founder were placed on trial in 1968 and found guilty of 'apostasy from Islam'. Mahmoud

Mohammed Taha and the movement were declared *kafir*, heathen or non-Muslim, the only such case in modern Sudanese history. In a final confrontation with the increasingly conservative Numieri regime, Ustaz Mahmoud Mohammed Taha was executed early in 1985 for his refusal to recant his views.

Still, the movement has survived, although it has disdained politics since the days when it started as the Republican Party. In recent years its ranks have swelled, particularly joined by women and students. Its position *vis à vis* the Shari'a is that the law cannot be secularized as this has led to tragic and disastrous results in Turkey and Iran, nor can it be reformed sufficiently to suit the needs of modern, complex society; so the only alternative is to fundamentally revise traditional Shari'a in order to bring it into conformity with existing notions of constitutional government, including the Permanent Constitution of the Sudan (Abullahi A. al-Naiem, 1980: 25).

The regular appearance of the Jamhuriyyeen on the streets of Khartoum and Omdurman and other major towns has prompted the anger of the head of the High Council for Religious Affairs and Endowments and other Islamic authorities who believe their work has become a cover for anti-Islamic activities.

CONCLUSION

The Shari'a, as a basic part of the Islamic religion and society, is very much a contemporary topic in the Muslim regions and in the West. In the West Islamic law is very often misunderstood and is thought to be overly harsh concerning the rights of women, as a result of rather superficial stereotyping based on limited knowledge of the laws of marriage and divorce. The social reality of Islam, not to mention Islamic law, is an alien subject to Western thought. Islamic law is more than simple jurisprudence and it embraces the very spirit of Islam (Said al-Ashmawy, 1983: 12).

In the Islamic areas the question of the status of the Shari'a in contemporary society, whether experiencing a revival or basic reform, is very much on the political–social agenda of regimes running the gamut from conservative to Marxist political orientation. Reform or revision of the laws has resulted in popular demonstrations for and against the changes, even in political trials and executions of opponents of reform, as in the case of Somalia and the Sudan. Other major amendments of the law have occurred within the context of national independence or revolutionary transformation of the society in question as in South Yemen, while others have restored the law to a more prominent social role within similar contexts of social revolution, as in Iran. For the

most part, where reform or restoration has occurred, it has taken place primarily as a result of internal developments, using Islamic procedures and personnel. The motivation may be some notion of 'modernization' along Western lines and may even be explicitly stated as in the case of Tunisia, but what is increasingly common is the resurgence of Islamic values, embodied in the law, in reaction to the penetration of Western culture. Although this latter trend is currently in evidence, it does not suggest a uniformity of view throughout the Islamic world nor even in a single Muslim country. Ideology, including attitudes toward the law and the status of the Shari'a in any given setting, is to be considered in light of the history and current political direction of a country.

The Shari'a in the Sudan evolved with the Islamic state itself, dating from the sixteenth century Funj kingdom, and its history is inseparable from the successive governments which have ruled the country, whether indigenous or foreign, secular or theocratic. The modern development of the Shari'a has been closely linked to political processes, and although the Sudan was often in a vanguard position with respect to reform in the law in the earlier decades of this century, it was very much a part of a wider movement spreading throughout Islamic regions. Despite the quest for suitable reform or amendment of the Shari'a, it is significant that in only one instance, that of Turkey, has total abandonment of Islamic law taken place. In every other case, even in Tunisia, Somalia and People's Democratic Yemen where the most dramatic events have occurred, the method chosen was reform of the Shari'a with its retention as a major, if not the major source of law, rather than extinguishing it as a source of legislation. New vitality and viability have been breathed into the law with the liberal usage of *ijtihad*, *maslaha al-mursala* and *siyasi Shari'a* or interpretation, in the interests of the common good and directives from a political sovereign, respectively. The indications for the continued viability of the Shari'a are strong, as it is so closely connected with Islamic religion and society. Indeed, as the development of the law has paralleled the development of economy and society, its future in any particular setting, including the Sudan, will be determined by these factors.

NOTES

1. The Democratic Women's Union was formed after 1971 when the original Union was banned for anti-government political activity. Many of its members are founders of the original Women's Union in 1946.

RECENT DEVELOPMENTS

In 1980 a program was announced by the government to amalgamate the Civil and Shari'a courts, which have been separated administratively and jurisprudentially for close to a century. The original recommendation dates back to 1972, but attempts to implement the amalgamation failed. Under the new plan the Shari'a section of the judiciary would be phased out and the exclusive practice of the Shari'a by judges, lawyers and the Shari'a Appeals Court would cease. A single High Court has already been created which effectively eliminates the office of Grand Qadi at the head of the system of Islamic courts. Of the seven members in the new High Court of the Sudan five are Civil Judges, and two Shari'a Judges. The position of the Mufti is retained.

As a result of the decision to amalgamate the Civil and Shari'a courts all practicing and prospective judges must undergo a three month in-service training course. This will temporarily remove fifty judges in each three month period until the program of training is scheduled to be completed. More than one judge has been critical of the relatively short training period in which civil judges are required to learn the practical aspects of the Shari'a and vice versa (*Sudanow*, September 1980: 13). Each of the universities, the University of Khartoum, Omdurman Islamic University and the University of Cairo, Khartoum branch, is capable of training graduates in both Civil and Shari'a law, and indeed the University of Khartoum required its law faculty graduates to be trained in both legal traditions until 1979.

Certain opponents of the amalgamation of the two systems of law argue that the national law itself needs to be unified first and then the courts combined and judges trained in the new code to be applied. In response to this criticism the former Chief Justice, Dr. Khalifall Al Rashid, replied that changing the law is the responsibility of the legislative branch of government. And indeed the Committee established in 1977 to bring Sudanese law into conformity with the doctrines of the Shari'a has become bogged down in its work, effectively coming to a halt. The debate over the implementation of the *hudud* and the question of interest

charges by banks and businesses led to a stalemate which resulted in the Committee's suspension in 1980.

Another problem raised by legists is the matter of the incompatibility of the Shari'a with the Western-based Sudanese Civil law, especially as regards procedures. For example, the Shari'a requires only oathtaking to establish proof, while Civil law requires two male or one male and two female witnesses. Hearsay evidence of reputation regarding genealogy, consummation of marriage, death of a person, the origin of a *waqf* or its conditions, the amount of the dower and other matters is admissible as evidence in the Shari'a courts while it is inadmissible in Civil courts. Questions arise not only as to which rules of evidence to follow, but as actual conflicts of law which could lead to miscarriages of justice (Vasdev, 1981: 50).

An important area of difficulty in the amalgamation of the Civil and Shari'a courts is the competence of non-Muslim judges to decide matters involving the personal status law of Muslims. They would be prevented from making such judgements, as non-Muslims are barred from testifying before a Shari'a court. Such exclusionary practices would certainly not unify the legal administration of all of the citizens of the Sudan, who include the 30 per cent non-Muslim, southern population, a very great number of whom reside in northern, predominantly Muslim cities.

Thus the unification of the Civil and Shari'a legal systems continues to be problematical. In practical terms, both Civil and Shari'a judges see the consolidation as an opportunity for one or the other law to make gains or achieve dominance. It should be pointed out that many Sudanese lawyers quite competently handle both systems of law in their practice. Shari'a judges, who are in the minority, would like to see in unification some equity in salaries and status with the Civil judges which, up to the present time, they have not enjoyed.

Yet another larger question looms on the horizon with respect to the structure of the law and the courts in Sudan. In October 1982, the Sudan and Egypt announced in Khartoum their intention to unify the two countries of the Nile Valley. In the main the unity is defensive and political with a mutual defense pact between the Mubarak and Numeiri regimes and a joint parliament, but unity is to extend to other features of life including, perhaps, a single legal code between the two nations.

Much of the outcome of this current instability in the legal scene in the Sudan will be determined by the politics of integration between Egypt and the Sudan and the local Sudanese reaction to this, as well as by the politics of internal unification between the various forces represented by secular and religious tendencies in the society. If history is the correct teacher, the Sudanese will most likely reject amalgamation with Egypt

on cultural, if not also political grounds. The Sudan has pursued a unique course in the development of its law and it must always confront the heterogeneity of its population within its vast borders, most particularly being mindful of the cultural–political integrity of its southern citizens. There has been fear expressed within the intellectual circles of that community of a new Muslim offensive with the movement toward the Islamic-based constitution.

What seems to be most appropriate is a major convening of jurists representing Civil, Shari'a and Sudanese customary law with the intention of drafting a national code of law that is derived from Sudanese life and traditions, including the relevant experience of Islamic law and customary law and the reception of English law in the Sudan. The history of all of these local traditions is lengthy and an adequate basis for making judgements as to the context and practicability of a new law.

* * * * *

Since this research was carried out in 1979–80, a number of dramatic changes have occurred which affect the status and operation of Islamic law in the Sudan. The amalgamation of the previously autonomous Civil and Shari'a Courts systems into a single judicial hierarchy was accomplished by executive order in 1980 by President Jaafar Numieri. This study which was completed in that year stands as historical documentation of the last years of an autonomous Shari'a legal system in the Sudan. Initially, with consolidation of the two legal systems, very little in the area of substantive law was changed; however the judicial structure was radically altered with *de facto* abolition of the office of Grand Qadi, the erection of a single High Court of Appeal and the requirement that all judges apply both Civil and Shari'a law as if they were a single code of law. Many judges opposed the latter requirement and resigned in protest.

The unified court system paved the way for the more radical step taken in September of 1983 whereby the Shari'a was proclaimed, by Presidential Order again, to be the sole guiding force behind the law of the Sudan. The Presidential Order was placed before the People's National Assembly of the Sudanese Socialist Union, the only legal political body in the country, and was ratified and made constitutional. The most sustained and politically significant voice of protest came from the Southern politicians who were joined by some Muslim secularists in their opposition to the theocratic trend of government. The proclamation that the laws will be brought into conformity with the principles of the Shari'a and 'follow the Islamic path' amounts to Islamic government and thus a dream come true for the Muslim restorationists.

In substance, the new full application of the Shari'a introduces into Sudanese law the *hadd* punishments, amputation for proven theft, the death penalty for adultery, proven or admitted, between married persons, and for armed robbery as well, and the Islamic punishment of flogging for drinking, or for the possession, sale or transport or manufacture of alcoholic beverages. Since the application of Shari'a as state law the *hadd* punishments for proven theft have been carried out, as has the punishment for drinking and alcohol abuse. Theoretically, these 'new' laws should apply only to the Muslims of the Sudan, but reports of Christian Sudanese and Westerners to whom these laws have been applied for alcohol use have circulated widely.

More significantly, the imposition of Islamic law as state law has aroused the fears of the Sudan's sizeable non-Muslim population. Many Southern Sudanese have interpreted the move as the latest attempt to Islamise them or to entrench Northern dominance over them. The 17-year civil war between the North and the South (1955–72) ended by mutual agreement in the Addis Ababa Accords, but renewed fighting in the South has intensified since the Presidential Order declaring state law to be the Shari'a. Islamisation of the law appears to have further alienated this significantly large (30 per cent) non-Muslim minority in the Sudan. The Sudan is thus proving a rather important test case for the full implementation of the Islamic Shari'a because of its religiously heterogeneous population and history of conflict, often articulated along religious lines.

With the order to Islamise its law the Sudan has moved into closer step with its immediate African neighbor, Libya, and it has continued a trend that is exerting a major impact in other Islamic countries. Unquestionably, the Shari'a is, at the present moment, under influence from the political right, whereas in the past it has been a leader in the reform of the law and has been changed by the effects of mass movements emanating from the left. Under colonialism the Shari'a establishment resisted efforts by the English to undermine its authority in order to make judgements consistent with an Islamic philosophy. After independence the Shari'a law responded to internal political pressures to change its own applied law in the Sudan. Indeed one of the more progressive periods for the Shari'a was in the immediate aftermath of the military coup by Jaafar Numieri in 1969 when a number of reforms favorable to women were introduced. The abolition of 'house obedience' in 1970 was the first time that state government had interfered with the autonomy of the Shari'a. Since 1971 the Sudan has experienced change in its basic political and legal institutions from the top down mediated through the one legal political party

backed by the armed forces. Ultimately, the reception of the Shari'a, or any law promulgated in the country, is a matter for the whole of the Sudanese people to determine.

On 6 April 1985, Jaafar Numieri was overthrown in a bloodless coup by General Siwar al-Dahab, who immediately came under pressure to ameliorate the harsh application of the Shari'a that had been practiced since September 1983.

APPENDIX I

THE SCHOLARLY SOURCES

MUSLIM, ORIENTALIST AND OTHER SCHOLARS OF THE LAW

'The Orient', understood as a distinctive region with a common culture, history, language and outlook, has been viewed in contrast, if not in opposition, to 'the Occident' since the colonial encounter between the two. In the context of that encounter lay the birth of Oriental scholarship, Orientalism, primarily a German, French and British enterprise until the American ascendancy after the Second World War. In recent years that scholarly tradition, characterized by its ideological posture of pro-Western, pro-colonial bias, has come increasingly under critical review (Anour Abdel Malek, 1959; Tibawi, 1963; Said, 1978). Orientalist scholars of the Shari'a have not been entirely free of this bias, but their contribution is nevertheless basic to knowledge about Islamic law in the West. Other scholars, particularly Arab and Islamic writers, have sought to provide a more accurate view of the law in an effort to inform or correct some of the shortcomings of the Orientalist scholarship. A brief summary of these works serves to point out their relative strengths and weaknesses. Only the last century of scholarship is covered here, and primarily that which exists in the English language and has therefore had its effect in the English-speaking world.

I have divided the various writers on the subject of Islamic law, its genesis, philosophical and positivist aspects, and its contemporary application, into the following groups: (1) Arab translators and interpreters of the law in the early and middle phases of the colonial experience; (2) Orientalist scholars working, for the most part, within the historical context of colonialism; (3) Arab, Muslim and Western writers during the post-colonial period seeking to correct the biases of Orientalist scholars.

For most of Africa and the Middle East, indeed the regions of the world which have experienced colonialism, scholarly activity can be characterized as having an initial period dominated by European research cast within an ideological framework of 'progress', defined

as development toward a Western model of government and law. As nationalist movements intensified and independence was won, the scholarship of indigenous writers and later European researchers reflected this change with a perceptible move away from the ethnocentric views of the former period. What is notable in this survey is the presence of an indigenous scholarship functioning in the earliest days of colonial penetration, which is in itself a testimony to the lengthy tradition of scholarly writing on Islamic subjects, including the law.

Among the earliest Arab writers is Sheikh Abdel Kadir Mekkawi of Aden who published in English and Arabic his treatise on 'Muhammedan' law entitled 'The Overflowing River of the Science of Inheritance and Patrimony' together with 'The Rights of Women and the Law of Matrimony' in 1899. His exposition of subjects relating to the personal law of Islam is a masterful presentation. For an English-speaking audience the book has the added value of the full transcription of the original Arabic. It is thus both a scholarly treatise and a reference manual for instruction in the law, organized according to topic, including sections on marriage, divorce, guardianship, child custody, etc. Although it is difficult to project backward in time, and determine the motives Sheikh Abdel Kadir had in writing his treatise, it is interesting to see that a major thrust of his work is directed to an elucidation of the rights of women in the law.

Ameer Ali's work, *Mohammedan Law*, published in Calcutta in 1894, is also an early effort to make a comprehensive statement in English of the scope and complexities of Islamic law. Mohammed Kadri Pasha's work, *Code of Mohammedan Personal Law According to the Hanafi School* (1884/1914), is an exception to these more scholarly studies. It is essentially a volume commissioned for colonialist purposes. The original work in Arabic is an effort to produce a code of law for the Shari'a, which is not a codified law but is based on the scholarly tradition within each school. The attempt to codify the law was an effort to produce a handbook of 'Mohammedan' personal law for use by colonial administrators whose work necessitated a familiarity with the Islamic law that was to be applied in the territories. For this reason the Hanafi school was selected for it is the most widespread in the British occupied areas of India and Pakistan, and in the remnants of the Ottoman empire which the English inherited, including the Sudan and Egypt. More than the preceding two studies, the *Code of Hanafi Law* is a practical manual of the law with its style of straightforward description without going into any of the philosophical bases of the Shari'a. Its scope is limited to topics in the personal law alone according to the dictates of the colonialist structure of the law generally relegating the Shari'a to the personal affairs of Muslims.

A second generation of Muslim writers on the law in English, primarily from India and Pakistan, took on the task of interpreting as well as describing the Shari'a. Asaf A. A. Fyzee (*Outlines of Mohammedan Law*, 1949, 3rd ed. 1964) explains that 'Shari'a is at the central core of Islam; no understanding of its civilization, its social history or its political system is possible without a knowledge and appreciation of its legal system' (p. 15). The volume does indeed outline the sacred nature of the genesis and application of the law in theory and speaks directly to problems of practice in the applied law in India. As such the study is a fine example of Muslim jurisprudence which conveys the impression of the distinctive body of law that is the Shari'a.

Likewise M. Hidayatallah's *Principles of Mohammedan Law* (16th edition in 1968) is a scholarly exposition of the law by one who was Chief Justice of India and a practitioner of Shari'a law. Like Fyzee he is both a careful scholar of the history and sources of law and an astute observer of its current status and future development in Muslim societies. He notes that for the most part Islamic countries have already reformed many aspects of the penal law, the laws of evidence, obligation and status and he sees that the 'desire for reform has proved stronger than the resistance to it' (p. xxvii). That the volume continues into at least 16 editions is some measure of its success, for it is not only a clear statement of the law, but an upholder of the relevance and vitality of the Shari'a for the modern era. He is openly critical of the nineteenth and early twentieth century efforts at codifying Islamic law which all failed in the sense that none was adopted as law. He is, in short, a Muslim scholar faithful to Muslim traditions, and though a product of the colonial period, not a servant to it.

The unfortunate use of the word 'Mohammedan' to describe the law is strictly a term used in connection with a Western audience. Colonial authorities consistently referred to the religion as 'Mohammedanism', and the followers as 'Mohammedans' as well as the law, and it became the accepted referent during much of the nineteenth and twentieth centuries. Fyzee (1964: 2) apologizes for his use of the term, clarifying that the religion taught by the Prophet Mohammed was Islam and those who submit to its precepts are Muslims – the religion properly is not named for its Prophet as is the case with Christianity.

THE ORIENTALIST TRADITION

There is little dispute that the systematic study of the law from a Western vantage point begins with the work of Ignaz Goldhizer (1910), who is among those who founded the modern science of 'Islamics' or Orientalism. His remarkable career as a scholar spans five decades from

1870 to 1921, when he died, and encompasses contributions written in German, French and English. Goldhizer epitomizes the Orientalist tradition in that his scholarly study of Islam is primarily removed from the actual cultural context of Islam. His only trip to the Middle East consisted of eight months spent between Damascus and Cairo in 1873–74 where, in the latter case, he was the first non-Muslim student to enroll in Al-Azhar University. Goldhizer was of Hungarian Jewish extraction and experienced the persecution of anti-Semitism in the fact that he never held a university position despite the depth of his scholarship. His knowledge of Hebrew led easily to the study of Arabic and of Islam and he felt a certain sympathy for the religion. Despite this, he, along with many Orientalists who succeeded him, ascribes the authorship of the Qur'an to Mohammed and makes a number of other statements that are distinctly offensive to Muslims.

Joseph Schacht continues explicitly in the tradition of Goldhizer (cf. Preface to *The Origins of Muhammadan Jurisprudence*, 1950) and is regarded as the pre-eminent Orientalist scholar of the law until the very recent period. In addition to his *Origins*, he is the author of *Introduction to Islamic Law* (1964) and numerous papers and treatises on the law. He is particularly credited with an exploration and analysis of the writings of al-Shafi'i with respect to the traditions emanating from the Prophet as the sole basis of his doctrine. His focus on this 'master' of one of the schools stems from his interest in the development of legal theory itself in Islam, the essentials of which were outlined by him (1950: 1). *Origins* is thus mainly an assessment of al-Shafi'i's thought and a deep probing of the history of the traditions of the Prophet. Schacht, as we shall see, agrees with the position of his predecessor, Goldhizer, that the *hadith* and *sunna* only began to gain currency in Islam after the deaths of the Prophet and his Companions, i.e., in the generation of the 'Successors' in the first century and a half of Islam. He sees in Shafi'i the rescue of the traditions and the securing of them in law and theology.

His *Introduction to Islamic Law* (1964) is a much more general treatment of the subject and in the intervening years since the publication of *Origins* his terminology underwent an evolution from 'Mohammadan' to 'Islamic'. Those years correspond to the demise of colonialism in many Muslim regions of Africa and Asia. In his discussions of Islamic law in this volume he aptly describes the Shari'a and *al-fiqh* as having developed as a 'jurists' law' where legal science and not the state has played the primary role in determining legislation. His discussion of 'the nature of Islamic Law', Chapter 26, summarizes much of Schacht's view of the law, which is that it is fundamentally sacred and therefore to a certain degree irrational; it is a systematic body of doctrine, but

legal concepts are abstract and lacking in positive content; the law has a private, individualistic character guaranteeing the rights and personal privileges of all individuals; the traditionalism of Islamic law, viewed as beginning with the closing of the door of interpretation (*bab al-ijtihad*), is perhaps its most essential feature.

In both his *Origins* and *Introduction* Schacht is overwhelmingly concerned with legal theory and the purity of the sources and the jurist's treatment of them. The secular character of the law is not addressed as such, except as deviations in applied law from the original sources. While admitting of modernist trends from the Ottoman period to the Anglo-French occupation of Muslim territories, these influences are regarded as altogether altering the pure system of law, rather than being a part of its internal development. It is the reception of Western political ideas which, in Schacht's view, has provoked the unprecedented movement of modernist legislation in the twentieth century (p. 4). Indeed he refers to 'modernist legislative interference with Islamic law' (p. 103), and cites the 'haphazard and arbitrary' character of the legislation which has not sprung from any genuine demand but from governmental intervention (p. 105). This position is contradicted by much of what is documented here for the Sudan, and in a sense Schacht has become more Islamic than the Muslims in his sympathy and demand for the original purity of Islam and the law. As with Goldhizer, this is caused by his own scholarly distance from modern times, i.e. nineteenth and twentieth century developments.

The closest contemporary parallel to Schacht's thinking is represented with the work of Aharon Layish, an Israeli scholar of Islamic law. His *Women and Islamic Law in a Non-Muslim State* (1975) is a study of the application of Shari'a in the occupied territories since 1948. His view is that the Israeli occupation has improved the status of Arab women who were held back by traditional Islamic law and Muslim society. It is striking then that he is opposed to the 'liberally-oriented modernist movement in Islam' (1978) because it is undermining the Shari'a and pure Islam in a secularizing drive. Layish sees the overall effect of the modernist trend as an ever-increasing erosion of orthodoxy in the law and doctrine (p. 267). His conclusion, that legal reform conducted by legislative act is outside the bounds of Islamic law, agrees fully with Schacht's position (p. 273). Layish's work is classically in the Orientalist tradition in that it is part of an active system of colonialism in the current state of Israel.

Schacht's last work, published in 1974 five years after his death, is an edited volume entitled *The Legacy of Islam*. His death did indeed leave a vacuum among senior Islamic scholars of the law in the West, one soon to be filled by N. J. Coulson who is altogether a different

manner of scholar. The volume (edited with C.E. Bosworth) is in many ways the culmination of Schacht's lifelong development as a scholar of the theology and law of Islam. Islam in Africa and Asia, Islamic literature, art and architecture and a host of other topics are covered in the volume as well as Schacht's last statement on Islamic religious law which is a condensation of general points made in the *Introduction to Islamic Law*. While there is much to be criticized in Schacht by this generation of scholars, his works remain a basic starting point in any study of Islamic law in the English language. Unto themselves in the context of current scholarship, they are insufficient, but as the essential Orientalist treatment of the Shari'a they are unexceptionable.

Another towering figure in the Orientalist tradition regarding the law is Sir J. N. D. Anderson. Unlike Schacht, his scholarship has dealt almost exclusively with positive law and the application of Islamic law in contemporary Muslim countries and regions. My own work with Islamic law in the Sudan is built on the literary effort of Anderson, especially his pioneering *Islamic Law in Africa* (1955) and a host of articles on specialized topics in the law and its reform in the Sudan and elsewhere (1960, 1956). His scholarship has always been expansive topically and geographically, as represented by *Islamic Law in the Modern World* (1959) and *Family Law in Asia and Africa* (ed.) (1968). It is a telling point that although Anderson and Schacht were contemporaries, Schacht never once cites Anderson's work, which is far too pragmatic. Anderson's work is without peer as a survey of the applied Shari'a in a variety of historical and political contexts from Northern Nigeria to India and Malaysia. To his credit Anderson is among the first Orientalist scholars to take a serious scholarly interest in Islam in Africa, frequently collaborating with his colleague, Spencer Trimingham, whose contributions to the study of Islam in the Sudan are singular and will be treated shortly. From his research in Africa and Asia, his interests took on a more general concern with questions of law and development in the less developed countries (1963).

Although a healthy departure from many of the Orientalists' firmly held biases regarding Islamic theology, Anderson's work falls within the tradition because of the close association with the colonialist authorities that is so evident in *Islamic Law in Africa* (first published as Colonial Research Publication no. 16, 1954) and the usual distance from the subject matter of the study that characterizes Orientalist scholarship. The aforementioned volume, while truly a classic survey, was nonetheless the result of a six-month visit to six African colonies and the Aden Protectorate with brief visits to three other countries. The work represented is prodigious, and few would attempt such a project

today, but Anderson everywhere had the assistance of the colonial authorities and their sanction of his research.

A progressivist and a modernist, Anderson evidences a sympathy for the reformist movements which have resulted in the changed application of Islamic law in a variety of circumstances. He applauds the reforms in the divorce law (1960) and speaks frankly about progressive and retrogressive change in the Shari'a law affecting the status of women in the Sudan (1955: 315). He was extremely pleased to learn of the appointment of women judges in the Shari'a court system in the Sudan (personal communication, March 1982). In this respect he diverges sharply from the view of Schacht and others regarding the sanctity and purity of the original law, and Anderson allies himself with the reformers, but not necessarily in the Muslim tradition. Indeed Anderson has been faulted by some Islamic scholars for his 'modernist' bias which is alleged to be pro-Western in the sense that positive change is viewed as emanating from the West. The argument follows that any move in the direction of Westernization is *ipso facto* part of the trend toward modernization. Anderson has been lumped with other Orientalist scholars in one critical review (Tibawi, 1963). But his central contribution, in my view, rests in his compilation of resources and legislation affecting the law and its operation in a wide variety of geographical and historical contexts, and making systematic statements about overall trends.

Perhaps the last of the Orientalist scholars of the law is N. J. Coulson, and his work already reflects the change in approach and thinking which is transforming Orientalist scholarship. His *A History of Islamic Law* (1964), a large section of which deals with modern legislation, was strongly criticized by Schacht (1965) in an article which contrasts the major views of 'modernism and traditionalism'. His sharpest break with Coulson is summarized thus:

I think on the contrary (to Coulson), correct appreciation of the history of Islamic law shows that it developed into its final, rigid form by a natural and almost inevitable process (cf. my *Origins*, 55), and that the modernist movement, though taking place in a situation which parallels that of the earliest lawyers of Islam, really constitutes a break with the immediate past and can hardly be said to 'preserve the continuity of Islamic legal tradition' (1965: 390).

The outcome of the struggle between traditionalism, as represented by Schacht, and modernism, as represented by Coulson and Anderson (who have collaborated on various occasions), makes it clear that the latter is the contemporary historical trend of Islamic legal scholarship. In fact Schacht seems to acknowledge this when he says in the same article that

the subject of the history of Islamic law in Western scholarship has undergone a fundamental change in the last fifteen years (1965: 388).

Coulson's career, in a way, began with this sharp contrast to the work of Schacht, although both scholars agree on the central role of al-Shafi'i in the development of the law. Coulson went on to establish himself as one of the important experts in Islamic law in the English language. His series of lectures given at the University of Chicago Law School were published as *Conflicts and Tensions in Islamic Jurisprudence* (1969) and represent a good statement of Coulson's non-static view of law, as opposed to the rigidity in the law of which Schacht speaks. In his essay he juxtaposes a number of principles held to be characteristic of the law, for example revelation and reason, authority and liberty, stability and change. In consideration of each Coulson explores the tension, the opposition of a law which is at once both divinely inspired and interpreted and administered by human beings.

Coulson represents a break with the Orientalist tradition in that he does not speak of the 'claim' of Qur'anic revelations or of the 'alleged' *hadith*. He is more respectful of Muslim beliefs, perhaps in part because he spent a year as Dean of the Law Faculty at Ahmadu Bello University in Northern Nigeria, but also because the style of scholarship in the West on Islamic topics is changing toward a less ethnocentric view of Muslim institutions.

Coulson's *Succession in the Muslim Family* (1971) is a highlight of his scholarly career as it is a systematic elaboration of one of the most difficult topics in Islamic law, that of inheritance. As such it is a most welcome contribution to the literature, and it was of great assistance to the present study. Coulson emerged from the Orientalist tradition but his work represents certain distinct breaks with it.

MUSLIM AND ARAB WRITERS IN THE POST-COLONIAL PERIOD

The post-colonial phase of scholarship on topics related to Islam and the law does not begin with any particular date, but is recognizable as ideology within a transformed system of relations. One of the earliest and most outspoken critics of Orientalism is A. L. Tibawi, a Palestinian scholar who suggested the relationship between Orientalism, as a body of knowledge and system of analysis, and Zionism, as a philosophical and practical political system (1963). He complains that Orientalists, as a group, possess an attitude to the Arabs and Islam which is lacking in the most elementary sympathy for the Islamic religion and the nationalist aspirations of Arab peoples. He cites the denial of the divine origin of Islam and the suggestion that the Prophet composed the Qur'an as but two examples of the offensive character of Orientalist scholarship,

while those who claim Islam must be reformed in order to survive in the modern era are guilty of the same sort of error. The notion that reform of the law is of Western inspiration is likewise unacceptable and J. N. D. Anderson is cited as one of the problematic scholars. 'Islamic beliefs are immutable; Islamic law, on the other hand, has its own instrumentalities by which change can be and has been effected and has no need of alien guidance' (ibid, p. 113).

A rather obscure but nevertheless important critique of Orientalism is that by Anour Abdel Malek, an Egyptian Marxist, who wrote *Orientalism in Crisis* (1959). Abdel Malek's philosophical objection to Orientalism stems not from the violence done to religion, as with Tibawi, but from the inextricable relationship between Orientalism and colonialism, it being described as the handmaiden of colonialism. The Orientalist reduces Arab peoples to ethnic or racial stereotypes, 'the Oriental'; his 'mind', his 'nature', and indigenous peoples become 'objects' of study, non-active, non-autonomous, non-sovereign (pp. 107–8). Abdel Malek's essay is among the first clearly stated denunciations of Orientalist scholarship; he and A. L. Tibawi are important precursors to the widely acclaimed critique of Orientalism by Edward Said (1978).

In many ways Said's book entitled *Orientalism* is directed to a more general audience of intellectuals and not just the specialist in Middle Eastern Studies. His book received wide public attention in North America and has come to represent one of the definitive critiques of Orientalist scholarship. He develops his argument from basic premises inherent in Orientalism ('imagine', he asks the reader, 'a field called "Occidentalism"'), to the treatment of technical subjects such as Said's own field of literary criticism. He cites H. A. R. Gibb as representing the Orientalists' preference for the term 'Mohammedanism' over Islam as another form of ethnocentrism which permits other erroneous statements such as the supremacy of Islamic law over theology. Gibb, the pre-eminent Orientalist for Said, evidences the same hostility to modernizing currents in Islam and a staunch adherence to Islamic orthodoxy as was discussed above with respect to Schacht (p. 280).

With respect to the law this means that indices of 'modernization' of the Shari'a in various countries and contexts will depend on standards established in the West using its own institutions as a measure. That polygamy continues to be judged as wrong and its elimination is viewed as a favorable step toward the 'fairer' Western model is but one example.

Certainly the overwhelming benefit of Said's book is that with its appearance the Orientalist hegemony can no longer remain unchallenged in wider academic circles.

Other writers in the contemporary period have reacted to the offense

against the religion of Islam conducted by the Orientalists and have sought to correct the inaccurate descriptions of Islam. Fazlur Rahman in his work *Islam* (1966, 2nd printing 1979) devotes almost an entire chapter to a critique of Goldhizer, Margoliouth and Schacht on the law and their treatment of the sources. Through his view as a Muslim scholar, the enormity of the assault on Islamic beliefs and sacred traditions is conveyed. Otherwise the book is a basic description, objectively treated, of the development of Islam including major sections on the law. The law is understood primarily from its sources, most especially the Qur'an and *sunna*, and the various schools of Islamic jurisprudence, to which the Orientalists have devoted so much time, are relegated to a secondary, historical place. More time is devoted to philosophy and Sufist thought than to doctrinal differences.

One of the sharpest critical views of Orientalist scholarship of Islamic law is found in the writings of Enid Hill (1976). Her critique is aimed at the liberal championing of the cause of reform in Islamic law in the West, without much regard to the social realities within which the law operates. She is part of the new generation of Western scholars who are increasingly sensitive to a Muslim point of view with respect to Islamic topics.

In my studies with Sheikh Mohammed al-Gizouli, Grand Qadi of the Sudan from 1973 to 1979, the issue of the Orientalist treatment of Islamic law was raised on a number of occasions. Sheikh al-Gizouli, being trained under the British system and possessed of a scholarly mind, had a keen interest in renderings in English of topics in Islamic law. The last Sudanese Grand Qadi addressed himself to that criticism of the Shari'a which has so pervaded Western thinking. I will quote his remarks to me:

Islam has been criticized, for example, for its acceptance of polygamy, but it is illogical to criticize one system based on a set of values from the point of view of another system. The Western system or society has chosen personal freedom, or the right of the individual to enjoy him/herself without restriction. In Islam, God has set certain purposes for society as a whole and certain behavior is necessary for the promotion of these values. Islam chooses chastity as an essential requirement for promoting a good society; Islam thus allows four wives so as not to promote adultery and to guard against immorality.

Those critics of Islam who are Muslims are influenced by the West. Islam is a way of life which guides all things in life. The Western and the Islamic system are not really comparable and you cannot use the measure of the Western life to judge Islamic society.

(Interview, 15 October 1979)

In many ways these remarks were generated by criticism from outside the Islamic world which has found its way into the inner circles of Islam, but this particular discussion occurred within the historical context of the seizure of the American Embassy by Iranian militants, an event which the Grand Qadi did not approve of but which we found great common interest in discussing. The aspect of the backlash against Western ideology which has infiltrated Islam was perhaps one of the more understandable elements of the Islamic Revolution in Iran. The essence of Sheikh al-Gizouli's argument is that it is illogical to apply the standards of Western culture and experience to Islamic society which is based upon fundamentally different premises. The argument is, of course, persuasively a cultural relativist one.

WRITERS ON THE SUDAN

Since this is the first book in English to deal specifically with the subject of Islamic law in the Sudan, the sources upon which I have had to rely are more general works on the Sudan, with the exception of the writings of J.N.D. Anderson.

In the 1940s, Anderson undertook a study of the Sudan as one of the examples of the Shari'a in process of development, with his first article, a more general survey, appearing in 1951. In it a number of the important Judicial Circulars regarding divorce are discussed and the leading role which the Sudan played is first enunciated. Anderson continued his more general approach to Islamic law on a regional basis with his *Islamic Law in Africa* (1955) which contains a large section in the Appendices on the development of the Shari'a in the Sudan. His interest in modern trends in the law continued with a number of specialized articles which appeared in the 1960s. He is concerned with aspects of the positive law and not the sources of the law, and thus his work, which covers approximately the period until independence in the Sudan, is basic for students of modern legislation. His approach is non-theoretical and Anderson clearly approves of most of the developments he has chronicled.

Another basic source, in the Orientalist tradition, is J. Spencer Trimingham, whose *Islam in the Sudan* (1949) contains much helpful information regarding the penetration, acceptance and expression of Islamic institutions, including the law. Working as a colonial official in the Sudan during the Second World War he devoted his free time to an interest in the history and contemporary culture of Islam in the Sudan. His work is classically Orientalist and today his reference to the 'inertia of Sudan and Islam' (p. 24) and 'the blessings that the colonial government gave to the Sudanese' (p. 252) are almost disregarded out

of hand. Moreover Trimingham's interest in the spread of Christianity in Africa is well-known and his studies of Islam in a variety of African regions, including West Africa, East Africa, Ethiopia and the Sudan represent areas where Christianity and Islam have historically been or are currently in conflict. His fundamental interest is thus from the religious side and his investigation of the Sudanese Sufi sects represents one of the basic sources on the subject. He is also the author of one of the first books on Sudanese colloquial Arabic (1946) and as one with facility in the language his works do evidence close contact with Sudanese people, albeit in a less than equal relationship.

One of the distinguished senior scholars from the Sudan, Yusuf Fadl Hasan, has written a basic work entitled *The Arabs and the Sudan* (1967) in which the introduction of Islam into the Sudan is detailed. Along with the gradual acceptance of Islam, Dr. Hasan chronicles the introduction of the Shafi'i and Maliki schools into the Sudan with the eventual preference and predominance of the Maliki school. Jay Spaulding has enriched this study with his indepth study of the social and political history of the Funj, the first Islamic kingdom (cf. O'Fahey and Spaulding, 1974; Spaulding, 1977).

As a study in law and society C. d'Olivier Farran's *Matrimonial Laws of the Sudan* (1963) is pioneering. Although a jurist, Farran is a sensitive observer of Sudanese society and his work contains a substantial contribution to the study of Muslim marriage. Farran is particularly interested in the practical area of conflict of laws such as might arise in the marriage of a Muslim to a non-Muslim or between Muslims of differing ethnic and thus customary backgrounds. This focus looks mainly toward the future of the law of personal relations in the Sudan as 'mixed' marriages are still relatively rare. Farran devotes some time to a history of Islamic law in the contemporary Sudan, and he recognizes the difficult circumstances under which the Shari'a has operated with respect to the dominance of the civil system of law.

Francis Mading Deng, a distinguished Sudanese scholar, lawyer and diplomat of Dinka extraction, has written widely on the subject of Dinka law (1971) as a variety of customary law in the Sudan. His analysis is philosophical as well as social and thus has provided valuable insights for the present study. Other studies of customary law in the Sudan (cf. Bruce, 1979) have been an important aid to ascertaining the position of the Shari'a in this ethnically diverse but dominantly Muslim country.

Other scholars whose work has provided important background material for this study include Richard Hill's contribution to the understanding of the Turkiya (1970); P.M. Holt's (1970) and El-Fahal el-Tahir Omer's (1964) studies of the Mahidiya; and Mohammed Omer

Beshir's (1974), Mekki Shibeika's (1959) and Muddathir 'Abd al-Rahim's (1969) studies of modern Sudanese history.

The nineteenth and twentieth century history of the Sudan, particularly the Mahdist and colonial periods, are well documented. The social life of a number of ethnic groups has been researched, particularly by the Hull group of social anthropologists (Talal Asad, 1970; Cunnison, 1966). An anti-Orientalist literature is beginning to emerge with special reference to anthropology and the colonial encounter (Talal Asad, 1973). For the most part, however, studies of Islam in the Sudan in the English language have been limited to Trimingham and parts of Anderson's work. This is the first study of Islamic law in the Sudan to appear in English. Indeed it is among the first such studies for any country where Islam exerts a dominant or major influence (see also Djamour, 1966; Layish, 1975).

APPENDIX II

JUDICIAL CIRCULARS OF THE SUDAN SHARI'A COURTS

Circular

1. Guardians of property of minors; n.d.; supplement, 1933.
2. Slavery and how to deal in law with former slaves; repealed by No. 46 of 1936.
3. Later repealed.
4. Disputes over land in Dongola, 1905.
5. Later repealed.
6. Transfer of clerks, 1906.
7. Repealed by Section 6, No. 46 of 1936.
8. Transfer of inherited wealth between Sudan and Egypt, 1908.
9. Recognition of documents from other courts, as amended in 1929.
10. Repealed by No. 41 of 1935.
11. Repealed by No. 29 of 1927. Transfer of Property for *Mahr*, *Hiba*, *Sadaq* (deferred).
12. Conflicts over inheritance of land, 1912.
13. *Hiba*, conditions and procedure, 1913.
14. Repealed by No. 29 of 1927.
15. Agreement between Sudan and Egypt that where a person dies with no heirs the property goes to government of permanent residence, 1914.
16. *Maa'zunin* and their work (no date).
17. *Nafaqa* for absent husband – *talaq khof al-fitna* – *talaq al-darar* (marriage arbitration) (no date, probably around 1915).
18. Procedures.
19. *Takharuj* (selling a share in inheritance), 1916.
20. Fees and schedule, 1916.
21. *Tarika*, 1916.
22. Registration of land and date palm trees, 1916.
23. Decrees issued in Saudi Arabia recognized in Sudan if accepted by the British authorities, 1918.

24. When absent person declared legally dead, 1921.
25. *Ifrazia* (division of estates), 1923.
26. Whole of estate to go to spouse if no other heir, 1925.
27. Court supervision of *wasi* – guardian of property of minors, 1936.
28. *Nafaqat al-'idda*, who can be a *hadina*, *nafaqa* for disobedient wife, miscellaneous matters (*hiba*, etc), age of majority, 1927.
29. *Al-muhur al-agraria-mahr* paid in buildings, 1927.
30. Application concerning inheritance, 1928.
31. Buildings divided among heirs, 1928.
32. Supervision of Imams in mosques, 1931. Supplement, 1935.
33. Fees schedule, 1932; changed in 1935.
34. *Hadana*, 1932.
35. Introduces orthodox Maliki interpretation on 'Guardianship in Marriage', 1933.
36. Repeal of Section 16 of 1902 Mohammedan Court Ordinance, 1933.
37. Registration of lands for inheritance, 1934.
38. Courts accept no declaration of nationality, 1934.
39. Keeping of records of estates for longer than 33 years, 1935.
40. Procedure for *Istifta*, 1935.
41. Divorce, maintenance, legitimacy, dower, gifts, 1935.
42. Endower of *waqf* pays registration fees at 3 per cent of value, 1935.
43. Vacations of Imams, 1935.
44. Creating First and Second class judges, 1936, with supplement.
45. Amends Section 16 of Circular 28, *nafaqa*, *tarika*, 1936.
46. Repeals Circular 2, 1936.
47. Condition under which Egyptian government will execute decrees for Sudanese courts, 1937.
48. Fathers not to negotiate property of minor sons without permission of court, 1937.
49. Equalizes shares of half and full brothers, 1939.
50. Separate book for inheritance decrees, 1940.
51. Grandfather treated as a brother, 1943.
52. Division of work between First and Second class courts, with supplement, no date.
53. Rules governing *wasiya* (wills), 1945.
54. *Waqf*, refers to Circular 42 and asks that it be repealed, 1955.
- 54A. Guardianship in Marriage, 1960, with supplement.
56. *Waqf*, Maliki law to be followed on moveable property, 1975.
57. *Waqf*, 1970, and explanatory note.

58. *Waqf* and native *waqf* registration, 1970, with supplement.
59. *Talaq al-darar* (divorce because of cruelty), 1973.
60. Methods of justice and *iftah*; divorce decrees and decrees connected with change or correction of names, 1973.
61. *Fidya* (ransom, divorce in consideration of), 1977.
62. Support of minors during child custody cases (*nafaqa*), 1979.

N.B. The Circulars are listed here as they have been reported in *Circulars and Memoranda of the Shari'a Courts (Manshurat wa Muzakarat al-Mhakim al-Shari'a)*, McCorquodale & Co.Ltd., 1949, and as they are on record in the Sudan Judiciary. Any chronological irregularities or discrepancies were perhaps the result of problems in record keeping.

APPENDIX III

CHRONOLOGICAL LIST OF SUDANESE GRAND QADIS

The Honorable Sheikh Mohammed Shakir (until 1917)
The Honorable Sheikh Mohammed Aroun
The Honorable Sheikh Mustafa Al-Maraghi
The Honorable Sheikh Mohammed Amin Gora'a (1923–31)
The Honorable Sheikh Nouman al-Garim (very active period) (1932–40)
The Honorable Sheikh Hassan Mamoun (1941–early 1950s)

(the foregoing all Egyptian nationals)

The Honorable Sheikh Ahmed al-Tahir (first Sudanese Grand Qadi)
The Honorable Sheikh Hassan al-Muddathir (1956)
The Honorable Sheikh Mohammed Abul Gassim
The Honorable Sheikh al-Beshir Ahmed Hedayda
The Honorable Sheikh Mahjoub Osman Ishaq (1960)
The Honorable Sheikh Yahya Abdul Gassim
The Honorable Sheikh Ismail Sayed Ahmed al-Mufti
The Honorable Sheikh Hassan al-Yaman
The Honorable Sheikh Seraj Eddin Mohammed al-Amin
The Honorable Sheikh Abdel Magid Ali Abu Gusaysa
The Honorable Sheikh Omer Ahmed Abder Rahim al-Hawag
The Honorable Sheikh Mohammed al-Gizouli (1973–79)

Women Islamic Judges Appointed Since 1970

The Honorable Sayeda Najua Kemal Farid (1970–present)
The Honorable Sayeda Amal Mohammed Hasan (1974–present)
The Honorable Anisa Rabab Mohammed Mustafa Abu Gusaysa (1974–present)
The Honorable Sayeda Fatma Mekk al-Sayed Ali (1974–present)

APPENDIX IV

GLOSSARY OF SHARI‘A
LEGAL TERMS

<i>al-ahwal al-shaksia</i>	personal status law, frequent referrent for the Shari‘a in colloquial use of the Arabic language.
<i>‘asaba</i>	agnatic heirs, full brothers in the male line
<i>‘awlad al umm</i>	half-brothers, literally sons of the mother
<i>bayt al-mal</i>	The Public Treasury
<i>bayt eta‘a</i>	Marital obligation of the wife to remain in the husband’s house.
<i>bint ‘amm (fabrda)</i>	the preferred marriage partner in Muslim marriage, where first cousin marriage is strongly favoured
<i>dia</i>	payment, in cash or some form of transferred wealth, in compensation for the death of an individual, whether voluntary or involuntary homicide; a basic part of Islamic legal practice that was incorporated into Sudanese Civil law.
<i>fatwa</i>	Decision issued by the Mufti which is not subject to the rules of procedure or evidence since the case is not heard in court, but is sent as an inquiry or petition directly to the Mufti. The <i>fatwa</i> is not legally binding, but represents an official opinion of the court.
<i>fidya</i>	‘ransom’ or release; payment of cash or relinquishing of entitlement to a debt, for example the debt of <i>mahr</i> or dower owed to the wife by her husband, in exchange for the ‘release’ of the wife from marriage.
<i>Grand Qadi (Gadi al-Guda’)</i>	The highest legal authority in Islamic law in the Sudan. Until independence in 1956, all Grand Qadis were Egyptian nationals appointed by the British colonial government.
<i>guardian</i>	see <i>wali</i>
<i>hadana</i>	The care and custody of children, stemming from the Arabic root <i>al-hidn</i> meaning breast, for the first right of custody lies with the mother until prescribed ages of the children when custody passes to the father and his kin. <i>hadin</i> – male custodian <i>hadina</i> – female custodian

<i>hanafi</i>	One of the four schools of Islamic jurisprudence founded by the Imam Abu 'Hanifa (699–766 A.D./80–150 A.H.), a characteristic of which is the use of the principle of analogical deduction (<i>qiyas</i>). His two principal disciples were Gadi Abu Yusef and Imam Mohaimmed al-Shaybani (Asaf A. A. Fyze: 32–3). The Hanafi school was introduced into the Sudan by the Ottoman administration in the 19th century and continued under the British colonial administration
<i>hiba</i>	Loosely translated as 'gift', but legally in the Shari'a <i>hiba</i> is the immediate and unqualified transfer of property or valuables without any return (Asaf A. A. Fyze: 209). In the Shari'a this meaning of gift is narrower and more specific as to the item given and the identities of the donor and receiver. <i>al-wahib</i> – the donor <i>mohub lehu</i> – the receiver
<i>hital/haram</i>	the two extremes in Islamic legal thinking, from that which is entirely legal (<i>hital</i>) to that which is strictly forbidden (<i>haram</i>).
<i>hokum</i>	A judicial decree, legally enforceable, eg. <i>hokum al-ta'a</i> , a decree of wifely obedience.
<i>'idda</i>	The period after divorce or death of the husband in which a woman must pass three monthly courses in order to insure that she is not pregnant. During the <i>'idda</i> period the wife is entitled to maintenance which is referred to as <i>nafaqat al-'idda</i> . <i>mo'a tedah</i> – woman undergoing <i>'idda</i> period.
<i>ifrazia</i>	The partition of the property of an estate which cannot be easily divided, eg. a car or store.
<i>ijma'</i>	'Consensus', in practice, the consensus of a body of Muslim scholars living in a particular area, or in the international community of scholars.
<i>'ilam</i>	Judicial decree from a Shari'a court.
<i>'ish-had</i>	A legal document, usually obtained in court, attesting to the completion of a legal action. Its literal translation means to bring two witnesses to attest to the desired legal end. Although usually <i>'ish-hadat</i> are used with respect to gifts and <i>waqf</i> , they may signify divorce decrees, name changes or changes in wills.
<i>'isma</i>	The legal duties and obligations of protection as well as rights of a husband with respect to his wife conferred at marriage. A woman is referred to as being in her husband's <i>'isma</i> .
<i>istiftah</i>	An inquiry of the court with respect to wills and inheritance. <i>mustefti</i> – the one seeking a judicial interpretation
<i>kitabiyya</i>	'a woman of the Book', referring to women from one

	of the great religious traditions other than Islam—Christianity or Judaism, for example. Marriage to a <i>kitabiyya</i> is allowed in Shari'a.
<i>maa'zun</i>	Recorder and Registrar of marriages and divorces who may or may not be attached to a Shari'a court. In rural areas the <i>maa'zun</i> may travel some distance to legally record a marriage, but the recording of a marriage or divorce is not essential from the point of view of the law, although it is a great legal aid.
<i>madhab</i> pl. <i>madahib</i> <i>mahr</i>	refers to one of the four recognized Islamic schools of jurisprudence, Hanafi, Maliki, Hanbali or Shafi'i. A bridal gift made by the husband to the wife without which the marriage is not lawful or valid according to Islam. In the Shari'a the term <i>sadag</i> is synonymous. Usually paid in a sum of money in prompt (<i>mu'ajjal</i>) and deferred (<i>mu'ajjal</i>) payments. It serves as a check on the capricious use of the unilateral right of divorce by the husband. <i>Mahr mithl</i> – the amount of <i>mahr</i> negotiated is adequate to the social standing of the girl.
<i>Maliki</i>	One of the four schools of Islamic jurisprudence founded by Malik Ibn Anas (713–795 A.D./90 or 97–179 A.H.); based in Medina and representing the principle of <i>ijma'</i> (consensus) and practice of the town of Medina. The Maliki school is characterized by the use of custom and tradition as a basis for interpretation of the law. By tradition, Sudanese Muslims follow the Maliki legal prescriptions: these Circulars represent a blending of both the Hanafi and Maliki schools.
<i>moalagha</i>	'suspended', usually referring to the individual in some legal conundrum where she/he is suspended, without rights, until the legal problem is solved; for example the disobedient wife who has fled the marital home because she fears harm from her husband is <i>moalagha</i> until the court solves her problem of lack of maintenance or grants her a divorce.
<i>Mufti</i>	A jurisconsult; in the Sudan the Mufti is attached to the Shari'a High Court whose legal authority is second only to the Grand Qadi. The Mufti gives legal opinions outside of the court setting. <i>iftah</i> – the method of legal interpretation <i>mustefti</i> – one who is seeking a judicial interpretation <i>istiftah</i> – inquiries of the court, the majority of which are sent by post
<i>munjiz</i>	By compulsion; can be applied to marriage where the father or guardian compels the marriage, or divorce, where a husband compels a divorce.
<i>nafaqa</i>	Maintenance, including food, clothing and lodging;

	primarily an obligation arising from marriage where the maintenance of the wife and dependent children is an obligation of the husband (Asaf A. A. Fyze: 202).
<i>nasab</i>	Blood relationship determined according to the Qur'anic laws of inheritance.
<i>nushuz</i>	The state of disobedience of a wife, legally interpreted in the Sudan as the wife having left the house of her husband.
<i>qassima</i>	the marriage contract in Muslim marriage
<i>sadag</i>	Synonymous with <i>mahr</i> in Shari'a legal terminology.
<i>Shari'a</i>	Literally 'the way', originally the road to the watering place; according to the holy laws, the path to be followed. The Canon Law of Islam, the totality of Allah's commandments.
<i>slavery ('abudiya)</i>	The legal rights and the proper treatment of a slave in Islam as well as the legal restrictions placed on the slave by the Shari'a. Irrelevant to the contemporary application of the Shari'a in the Sudan; however, it is noteworthy that Judicial Circular no.2 deals with certain legal rights of emancipated slaves.
<i>ta'a</i>	The obedience that a wife specifically owes to her husband in Muslim marriage.
<i>al-tahkim</i>	Marriage arbitration conducted by two impartial persons in an effort to reconcile differences between a husband and wife and thereby avoid divorce.
<i>takharuj</i>	Literally 'going away', where an heir to an estate gives away or sells his/her share to another heir or non-heir.
<i>talaq</i>	Divorce, repudiation which is the unilateral right of the Muslim husband who is of sound mind. According to Sudanese law the 'triple pronouncement' (' <i>talaq talata</i> ') must be made on three separate occasions (Circular no.41). Judicial divorce, sought by the wife, is recognized in the Sudan on a variety of grounds, including non-support, cruelty, impotency or disease in the husband and a number of other grounds. <i>talaq al-darar</i> – divorce for reasons of cruelty, mental or physical. <i>talaq khof al-fitna</i> – divorce because of the fear of temptation; the wife applies after an extended absence of her husband, usually beyond one year, on the ground that she is being deprived of conjugal relations in marriage and fears being tempted into adultery. <i>talaq al-'ayb</i> – divorce because of impotency on the part of the husband. <i>talaq ala mal</i> or <i>fidya</i> – divorce in consideration of property; the wife offers some part of her <i>mahr</i> or other compensation to the husband for divorcing her; in this

	type of divorce she relinquishes her rights otherwise extended to a divorced woman.
	<i>talaq al-rajia'</i> – revocable divorce
	<i>talaq al-bain</i> – irrevocable divorce
<i>tarika</i>	Estate of a deceased person.
<i>tenfiz</i>	An appeal to the next highest court.
<i>tobe</i>	Northern Sudanese female style of dress, not mandated by Islam but associated with Muslim Sudanese women; about 9 meters of cloth is wrapped around the body over a simple dress underneath.
<i>'urf</i>	custom that is recognized by the Shari'a provided that the customary practice does not conflict with any basic tenet of Islam or Shari'a
<i>wasiya</i>	Wills, whether oral or written; no particular form of a will is prescribed; if the will is in writing, it need not be signed; if it is signed, it need not be attested. A Muslim is legally permitted to bequeath no more than one-third of his/her estate by will. The remainder is divided according to the Qur'anic laws of inheritance.
<i>wali</i>	<i>al-wali</i> is the legal guardian of a woman in marriage, usually her father or his close agnatic kin, but any adult Muslim male of sound mind or a Shari'a judge may act as marriage guardian. <i>wali mujbar</i> , the compulsory marriage guardian. <i>al-wali Shari'a</i> – the legitimate guardian <i>al-wilaya fi zowaj</i> – the question of guardianship in marriage
<i>wasi</i>	<i>al-wasi</i> is the guardian of a minor's property, usually close kin.
<i>waqf</i>	A religious endowment of property or land, the use of which is normally for charitable purposes. Hanafi jurists recognize three elements: (1) ownership by God which makes the <i>waqf</i> irrevocable and owned in perpetuity; (2) extinction of founder's right; (3) the benefit of mankind (Asaf A. A. Fyze: 269). <i>waqf al-ahli</i> – 'Native' <i>waqf</i> – endowment made to certain of the donor's heirs; because of the potential for misuse of these <i>waqfs</i> for the purpose of disinheriting certain heirs, the rights to make such <i>waqfs</i> have been abrogated (see Circular no. 58). <i>awqaf</i> – plural
<i>al-yamin</i>	An oath on the Qur'an sworn in court or taken in the presence of witnesses.
<i>zina</i>	The act of adultery.

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